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No. 21567

2439

V. 3439

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON et al.,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal From The United States District Court
For The Southern District Of California
Central Division

FILED

MAR 28 1967

Eldon O. Haldane
601 South Vermont Avenue
Los Angeles, California

Appellant in Pro Per

WM. B. LUCK, CLERK

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IN THE
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ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON et al.,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADING AND FACTS
DISCLOSING JURISDICTION

The complaint alleges that defendant state officials and attorneys deprived plaintiff of rights, privileges and immunities secured to plaintiff by the United States Constitution, and particularly secured to him by the Civil Rights Act, 42 USC 1985 (3) and Sec. 1, Amendment 14 of the Constitution (R. 2) by seizing and imprisoning plaintiff without warrant or probable

cause (R. 3-15 incl.) denied bail (R. 5, par. 14) under pretense or pretext of an absolutely void insanity or "mental illness" (R. 10-15 inclusive) proceeding - a complete nullity on its face, by reason of which plaintiff sought damages under the Federal Civil Rights Act and other relief (R. 9).

The defendants filed motions to dismiss (R. 53, 93, 63, 22, 16, 73) which the trial court granted on the ground that the complaint fails to state a claim upon which relief can be granted (R. 111).

The district court had jurisdiction under 28 USC 1331, 1343; the Court of Appeals has jurisdiction under the provisions of 28 USC 1291 and 1294 (1). The pleadings necessary to show the existence of the jurisdictions appear at R. 2-15 inclusive and R. 111.

STATEMENT OF THE CASE

Statute

42 USC 1985 (3) provides:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of

the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or

deprivation, against any one or more of the conspirators. RS. 1980."

42 USC 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FACTS

The facts are those alleged in the complaint and summarized above under Statement of Pleadings and Facts Disclosing Jurisdiction. Haldane v. Chagnon, 345 Fed.2d 601 erroneously decided that persons bent on defiling the Constitution and laws of the United States have an English (italicized) common law immunity to do so. Such decision is manifestly plain error and would constitute judicial repeal of the Civil Rights Acts and the Constitution itself. Neither the Constitution nor Congress adopted the common law; there was

and is no common law of the United States. Neither the President, nor Congress, nor the Courts, possesses any power not given by the Constitution (R. 116, 117, 118). We are all bound by the Civil Rights Acts and by Amendments 13, 14 and 15 which they were designed to implement. Felony is not privileged.

QUESTIONS INVOLVED

Where a complaint alleges that defendants in complicity with state officials instigated a counterfeit, sham, void "mental illness" (insanity) proceeding without any pretense of due process or equal protection (R. 3, par. 7) absent cause or probable cause, without any attempt to comply with mandatory statute, with total ignorance of the negro selected to initiate the sham proceedings as his only qualification (R. 3, par. 4) -- is a claim stated under the Civil Rights Acts?

SPECIFICATION OF ERROR

1. The trial court erred in granting defendants' motion to dismiss the complaint and in dismissing the action.
2. The trial court erred in considering Haldane v. Chagnon, 345 Fed.2d 601 as res judicata or for any purpose. The parties are different. It was NEVER considered on

the merits. The tyranny, felony and absolute despotism of the defendants has now progressed to the point of open anarchy and must be halted.

3. The trial court erred in failing to sense a massive, corrupt attack on the Constitution and laws, corruption of the Government itself. Root Refining Co. v. Universal Oil Products, 169 Fed.2d 514, 541.
4. The trial court erred in refusing to recognize felony misconduct in the state courts requiring the exercise of the Federal courts' summary jurisdiction.

ARGUMENT

(Summary)

Appellant submits that Monroe v. Pape, 365 US 167, Mapp v. Ohio, 367 US 643, and Rochin v. California, 342 US 165, are dispositive of the instant case. The vicious, savage, degenerate acts of the defendants in full complicity with the State of California, by void, counterfeit state action, constitute grave criminal continuing offenses to be construed in pari materia with their strict or absolute civil liability.

ARGUMENT

(Extended)

That there is liability for an illegal search and seizure has been settled since Entick v. Carrington, 19 How. St. Rep. 1029 (1761). For a fascinating discussion of this case, see Boyd v. United States, 116 US 616.

Numerous cases have sustained the right of citizens to recover damages in the federal courts from state officers under facts not dissimilar from and far less aggravating than those in the instant case. For example:

Hardwick v. Hurley,
289 Fed.2d 529;

Picking v. Penn. R. Co.,
151 Fed.2d 240;

McShane v. Moldovan,
172 Fed.2d 1016;

Geach v. Moynahan,
207 Fed.2d 714;

Davis v. Turner,
197 Fed.2d 847.

The case of Tenney v. Brandhove, 341 US 367, holds only that the Civil Rights Act does not apply to the particular conduct of state legislators involved in that case, where there was a constitutional immunity spelled out.

Indeed, the Supreme Court reaffirmed Kilbourn v. Thompson, 103 US 168, which held the Sergeant-at-Arms of the

House of Representatives liable in damages.

Moreover, in Bell v. Hood, 71 Fed.Supp. 817 the trial court said:

"Whenever a Federal officer or agent exceeds his authority, in so doing he no longer represents the government and hence loses the protection of sovereign immunity from suit."

Similarly, in Philadelphia Co. v. Simpson, 223 US 605, 619, this Court stated:

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights and property they have wrongfully invaded."

And, in Land v. Dollar, 330 US 731, this Court stated:

"An agent or officer of the United States who acts beyond his authority is unanswerable for his action."

And, at page 738:

"Government officials may become tort feasons by exceeding the limits of their authority."

Appellant adopts and reiterates STATEMENT OF POINTS AND ISSUES APPELLANT INTENDS TO PRESENT ON APPEAL (R. 116, line 7, and R. 117, 118). Same are incorporated herein by reference and made a part hereof.

Haldane v. Chagnon, 345 Fed.2d 601 was wrongly decided on the theory of English common law immunity as defined by Chief Justice Kent in the New York case of Yates v. Lansing (1810), 5 Johns. 282; the cited case should be reviewed and overruled because federal Civil Rights Acts are involved.

The law of the state must yield when incompatible with federal legislation.

Gibbons v. Ogden, 9 Wheat. 1, 211. Cf. Art. VI, cl. 2, U.S. Const.

The decisions of the highest state court as to interpretations of state law are not binding on the Supreme Court when federal rights are abridged.

Greenough v. Tax Assessors,
331 U.S. 486, 497.

Federal law in patent and copyright matters prevails over state law. There cannot be read into the federal statutes and regulations that the practice of patent law must not be inconsistent with state law.

Sperry v. Florida Bar (1963),
373 US 379, 384.

Neither our Constitution nor Congress adopted the common law; there was and is no common law of the United States, conclusively shown by the controlling cases:

Wheaton v. Peters,
33 US (8 Pet.) 591;

Levy v. McCartee,
31 US (6 Pet.) 102, 110;

Swift v. Phila. & R.R. Co.,
64 Fed. 59, 61, 64;

Walker v. Globe Newspaper Co.,
130 Fed. 593, 596;

Kennedy v. Delaware Cotton Co.,
58 A. 825, 828, 4 Penn. 477;

In re Dean,
22 A. 385, 386, 83 Me. 489.

The Supreme Court held that the Civil Rights Statutes may NOT be set at naught or its benefits denied by state statutes, state common law rules, or state decisional law:

Sola Electric v. Jefferson Electric,
317 US 173, 176;

McNeese v. Board of Education (1963),
373 US 668, 671.

Plaintiff's complaint (R. 2-15 inclusive) discloses criminal violations of 18 USC 241, 242, and civil violations of 42 USC 1983, 1985 (2) (3) and 1986; considered in pari materia, the clear and present danger to plaintiff and his family is tragically apparent.

Baxtrom v. Herold, 383 US 107 (Feb. 1966) vividly illustrates the proscribed denial of Equal Protection under the Fourteenth Amendment.

The state's overwhelming involvement in the prohibited conduct is illustrated by the following cases:

Burton v. Wilmington Pkg. Auth.,
365 US 715, 725;

Shelley v. Kraemer,
334 US 1, 18.

The Supreme Court has not hesitated to overrule earlier decisions for good cause. Smith v. Allwright, 321 US 649, 665. Haldane v. Chagnon, 345 Fed.2d 601 is clearly in this category; it is urged that any doubtful question of law be certified to the Supreme Court authority 28 USC 1254 (3) for clarification. Cf. United States v. Barnett (1964), 376 US 681. Gov. Barnett of Mississippi, Gov. Wallace of Alabama - the President, the Congress and the Courts, have been held bound and bound absolutely by the Constitution. The so-called common law immunity from its provisions is simply non-existent, because, to repeat, neither the Constitution nor the Congress has ever adopted the common law.

The perpetrator and also the instigator of false imprisonment is responsible to the victim:

Jillson v. Caprio,
181 Fed.2d 523 (2);

Hoppe v. Klapperich,
224 Minn. 224, 28 NW2d 780, 173 ALR 819.

All the state court proceedings are tainted with fraud, felony, lack of jurisdiction of the subject matter (Bradley v. Fisher, 13 Wall. 335, 351) brutality, personal and official dishonesty, vicious unfairness, dissolving the state court's jurisdiction to enter any judgment in the pending divorce action because of denial of due process and Equal Protection by the state in the course of the proceedings. Re L. A. Pioneer Society, 217 Fed.2d 190, 194. All state proceedings became void ab

initio because infected with felony unfairness. Entry of a final decree on Jan. 29, 1963 was a judicial act under color of State law (Katz v. Karlsson, 84 Cal.App.2d 469 (2) 447) which purported to finalize the abduction of plaintiff's family, the destruction of all his real and personal estate. The constitutional infirmity is obvious.

COURT SHOULD APPLY THE APPROPRIATE
CIVIL RIGHTS STATUTES

Baldwin v. Morgan, 251 Fed.2d 780, 786 (24) reads as follows:

"This is within reach of the statute and the statute as to wuch right is within the reach of the Constitution. If these facts bring into play this statute, the plaintiffs are not to be deprived of their right of attempting to prove the deprivation simply because, while 42 USC 1981 and 1983 were expressly cited in the complaint, Section 1985 (3) was not. As in Lewis v. Brautigam, 5 Cir., 227 F. 2d 124, 128, if '* * the gist of the action may be treated as one for the deprivation of such rights ** ', the Court should apply the appropriate Civil Rights Statutes, whether correctly described or not."

APPELLANT ADOPTS AND RENEWS
CITATIONS OF LAW TO THE DISTRICT
COURT BUT NOT CONSIDERED.

These appear at R. 73, R. 84, R. 87, R. 47, R. 80,
R. 103; repetition in this brief proper would extend same unduly.
Summary proceedings against attorneys is dealt with at R. 50,
that Justice be undefiled.

PURPORTED PETITION (R. 10) A
COMPLETE NULLITY ON ITS FACE

Same was executed by Tomlin, who had never seen plaintiff
in his entire life (R. 2). Tomlin recited false hearsay. No
threatening letter appears or ever appeared. Nix, state judge,
had no jurisdiction to issue such a tyrannical and felonious order.
No cause or probable cause appears.

Sec. 5050 of the Welf. and Inst. Code provides in
relevant part:

"If it appears to the judge from a certificate of
a licensed physician and surgeon dated not more
than three (3) days prior to the presentation of
the petition and filed with the court, certifying
that he has examined the person and is of the
opinion the person is mentally ill, and because
of his illness is likely to injure himself or others

if not immediately hospitalized or detained, or if it otherwise affirmatively appears that said person is likely to injure himself or others, the judge may issue and deliver to a peace officer or counselor in mental health of the county an order directing that the person be forthwith detained . . ."

No such certificate was ever produced. Actually, all the judges of all the courts of California have NO JURISDICTION to act except in conformity with Constitution and statute. Such limitation includes the appellate courts.

"Being a creature of statute, jurisdiction to enter an order of commitment pursuant thereto depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding . . . proceedings such as the one under consideration are purely statutory and are not based upon the common law . . . If jurisdiction is not acquired by reason of the affidavit not complying with section . . . 5050, Welf. & Inst. Code, it appears that the subsequent action of the court in directing the issuance of the commitment does not give vitality to that which was void in the first instance."

In re Raner, 59 Cal.2d 635, 639, 640, 381 Pac.2d 638.

The state judicial proceeding is not immunized as against the Fourteenth Amendment. Shelley v. Kraemer, 334 US 1, 18.

ORDER FOR DETENTION (ARREST AND
IMPRISONMENT) VOID

Miller, state judge, signed the order (R. 11) which is an arbitrary and groundless as any issued by the late Adolf Hitler himself. There is no compliance and no attempt to comply with the mandatory statute. The recitals therein are false. Miller necessarily knew that his bailiff Tomlin's certification was false and untrue. The principles enunciated in two recent cases that went up from the Ninth Circuit were outraged and violated:

Wong Sun et al. v. United States (1962),
371 US 471;

Robinson v. California (1961),
370 US 660.

While Miller is not a party defendant, his and Tomlin's actions rendered the so-called petition legally insufficient to vest jurisdiction in any court for any purpose (R. 5).

"Until a conspirator affirmatively withdraws from a continuing conspiracy there is a conscious offending that prevents the statute from running."

Hyde v. United States,
225 US 347, 348.

The complaint (R. 2-15 inclusive) discloses no such withdrawal from a malevolent continuing conspiracy to destroy appellant, his family and his property, to destroy the Constitution and the laws of the United States upon the altar of defendants' greed and vengeance. There is not one mitigating factor (R. 5, 6, 7).

APPELLANT'S ARREST WITHOUT ANY WARRANT

R. 5 alleges arrest and imprisonment without any process of any sort; the purported certificate of service was produced sometime after appellant was imprisoned; it does not reflect the truth (R. 12).

"Arrest on mere suspicion collides violently with the basic human right of liberty."

Henry v. United States,
361 US at p. 101.

APPELLANT MEDICALLY EXAMINED WITHOUT ANY JURISDICTION

R. 13, 14, reflects "not mentally ill" findings after appellant's person and property had been violated.

There is no immunity to violate the Fourth Amendment.

Hughes v. Johnson,
305 Fed.2d 67 (9 Cir. 1962).

NONE OF DEFENDANTS OR THEIR
ACCOMPLICES APPEARED TO SUPPORT
THEIR KNOWINGLY FALSE CHARGES.

R. 10-15 inclusive is the "petition" in its entirety.

Its instigators and accomplices incurred civil and criminal liability which is a blot upon our jurisprudence and civilization, within the purview of Windsor v. McVeigh, 93 US 274, 277.

Defendants falsely imprisoned appellant in violation of statute. Maben v. Rankin, 55 Cal.2d 139 & Cit.

Defendants falsely procured denial of bail in violation of Constitution and In re Keddy, 105 Cal.App.2d 215, 220, 221, 233 Pac.2d 159.

Defendants conspired to deny plaintiff-appellant federal Constitutional due process of law and equal protection of the laws, and to violate state law as follows: Calif. Penal Code 182. Criminal conspiracy: Acts constituting: Punishment: Venue. If two or more persons conspire:

1. To commit any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses . . .

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due

United States v. Guest,
16 L.Ed.2d 239, 86 S.Ct. ____ (1966),
383 US 745.

United States v. Price,
86 S.Ct. 1152, 383 US 787 (1966).

Amendment 14 clearly denounces denial of any trial at all to accused. United States v. Price, supra. All the proceedings in the Haldane matter were equivalent to no trial at all.

COURT OF APPEALS MAY ORDER DRASTIC
ENFORCEMENT OF CIVIL RIGHTS, PAY-
MENT OF PLAINTIFF'S ATTORNEY FEES.

Lance v. Plummer, 353 Fed.2d 585, cert. den. 1966,
16 L. Ed.2d 532 .

NO ATTORNEY OR STATE OFFICER OF
ANY GRADE HAS IMMUNITY TO COMMIT
FELONY OR VIOLATE CONSTITUTION
AND LAWS:

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169 Fed.2d 514, 541;

Re Craig,
12 Cal.2d 93.

ARREST ORDER CANNOT BE BASED
UPON HEARSAY, NOR UPON ANY STATE-
MENT, HOWEVER POSITIVE, WHICH IS
FOUNDED UPON HEARSAY:

Neves v. Costa, 5 Cal.App. 111 (Cited with approval in

Singleton v. Perry, 45 Cal.2d 489, 494);

Collins v. Jones, 131 Cal.App. 747;

Re Hofmann, 131 Cal.App.2d 758-762.

It is urged that the Court of Appeals act exactly as though it were the Supreme Court of the United States, order summary, injunctive and pecuniary relief under Sec. 1, Fourteenth Amendment, proscribing certain state action or action by those acting in complicity with state officials, and under the provision of the appropriate Civil Rights Acts (Bell v. Hood, 327 US 678, 681, 682, 684) to restore Due Process and Equal Protection to the state courts in Los Angeles County, Calif., where anarchy has taken over. The Constitution and laws of the United States are the real proponents before the Court.

The judgment should be REVERSED; 345 Fed.2d 601 should be overruled.

Respectfully submitted,

/s/ Eldon O. Haldane
ELDON O. HALDANE

Appellant in Pro Per

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eldon O. Haldane

ELDON O. HALDANE

Appellant in Pro Per

No. 21567

In the
United States Court of Appeal
For the Ninth Circuit

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON,
HORACE N. FREEDMAN, LEONARD
S. SANDS, GORDON THOMPSON, WIL-
FRED H. TOMLIN, and ALBERT D.
MATTHEWS,

Appellees.

Appellees Reply Brief

APPELLEES TOMLIN AND MATTHEWS'
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In the
United States Court of Appeal
For the Ninth Circuit

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON,
HORACE N. FREEDMAN, LEONARD
S. SANDS, GORDON THOMPSON, WIL-
FRED H. TOMLIN, and ALBERT D.
MATTHEWS,

Appellees.

No. 21567

Appellees Reply Brief

**APPELLEES TOMLIN AND MATTHEWS'
JOINT BRIEF**

Appellees Tomlin and Matthews, jointly, but for themselves alone and for no other appellee, respectfully file this brief in answer to appellant's Opening Brief and in support of the judgment of the District Court dismissing appellant's action on the ground that it fails to state a claim upon which relief can be granted against these and the other appellees.

Appellant's Complaint in this cause was brought under the Federal Civil Rights Act (42 U.S.C.A. 1983)

for alleged deprivation of his civil rights in relation to certain psychiatric court proceedings conducted by the Superior Court of Los Angeles County, California.

The Judgment of Dismissal entered by the District Court in favor of appellees Tomlin and Matthews, was correct and proper and can be sustained on at least the following grounds.

1. Res judicata as to appellee Tomlin.
2. Barred by the applicable three year statute of limitations as to appellee Tomlin.
3. Under the principle of stare decisis as to appellees Tomlin and Matthews.
4. On the ground of judicial immunity as to appellee Matthews.
5. On the ground that the matter has been heard and decided in the State Court.

On the foregoing grounds hereinafter thoroughly detailed under "Discussion," appellees Tomlin and Matthews respectfully urge that the District Court has properly dismissed the Complaint at bar in respect to them and that the judgment of Dismissal entered in their favor herein should be affirmed.

DISCUSSION

I

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE TOMLIN UNDER THE DOCTRINE OF RES JUDICATA.

Since the Complaint herein is the same or very similar to the Complaint in *Haldane v. Chagnon*, et al., 345 F. 2d 601, and relates to the same cause of action as against appellee Tomlin, the District Court action in dismissing the within Complaint and entering a judgment in favor of Tomlin, can be sustained on that ground.

On March 5, 1964, appellant herein commenced an action in the United States District Court, Southern District of California, Central Division, being case number 64-293-CC. In said action, appellant named Wilfred H. Tomlin as one of the defendants, who is the same individual named as a defendant in this cause.

By examining the 1964 Complaint and exhibits along with the current Complaint and exhibits at bar, it can be seen that appellant's claim is based on the same set of facts. The 1964 Complaint and the current one both allege that appellant was deprived of his civil rights by reason of the very same psychiatric court proceedings. With respect to defendant Tomlin, appellant alleges in both Complaints that Tomlin signed the Petition of Mental Illness.

On May 12, 1964, the District Court dismissed the action as to all the defendants, including defendant Wilfred H. Tomlin. On May 21, 1964, appellant gave notice of appeal from this prior judgment of dismissal and on May 5, 1965 the Ninth Circuit in *Haldane v. Chagnon, et al.*, 345 F. 2d 601, affirmed the dismissal in respect to Tomlin and the other named defendants. As to defendant Tomlin, the Ninth Circuit stated at page 604:

“The defendant bailiff acted at the direction of the judge to whom he was immediately and directly responsible. In so doing, he was a part of the body of the court itself. In *Hoffman v. Halden, supra*, we held that a jailer or keeper was not liable under the Civil Rights Act for ‘performing a duty which the law at that time required him to perform.’ A court’s bailiff is required by law to preserve order in the courtroom, to protect the court, and to comply with directions given him by the judge during the course of judicial proceedings. It is alleged that the defendant bailiff here, in signing the petition which alleged the bailiff’s belief that appellant was in need of medical care, did so at the express direction of the judge whose arm and agent he then was. In the light of our decision that there can be no valid claim against the judge, the bailiff is entitled to the protection of the judicial immunity which surrounded the whole court.”

Since the appellant has made the same allegations against appellee Tomlin in the 1964 and the current Complaint, since appellee Tomlin was named as defendant in both Complaints, since both Complaints were based on the same set of facts and asked for substantially the same relief, the case of *Haldane v. Chagnon*, et al., 345 F. 2d 601, decided by the Ninth Circuit, should be res judicata as to appellee Tomlin and the dismissal of appellant's Complaint as to Tomlin can be based on that ground.

In *Rhodes v. Houston*, 202 F. Supp. 624, the plaintiff had brought an action under the Civil Rights Act in which he named certain defendants. The District Court dismissed the Complaint as to all the defendants. The District Court dismissal was affirmed in *Rhodes v. Houston*, 309 F. 2d 959 (8th Circuit 1962).

Subsequently, the same plaintiff brought a new action under the Civil Rights Act in the same District Court and named many of the same defendants who had already recovered a favorable judgment of dismissal in a prior action (although this later Complaint also named other new defendants).

The District Court dismissed this second action in favor of all defendants who had prevailed in the prior judgment with reliance on the doctrine of res judicata (and likewise dismissed in favor of all the newly named defendants under the principle of stare decisis).

On appeal from the second and subsequent dismis-

sal, the Eight Circuit affirmed in *Rhodes v. Meyer*, 334 F. 2d 709 (8th Circuit 1964) and said at pages 712, 713 and 716:

“The defendants in Meyer and Van Steenberg who were also defendants in Houston asserted the defense of res judicata in their various motions to dismiss and such defense is maintained in these appeals. After a thorough, and we believe accurate, examination and comparison of each of the actions below with Houston, Judge Delehant [the District Court judge] concluded:

“ “[T]his court would be on solid ground if it were to regard *Rhodes v. Houston* * * * as dispositive adversely to the plaintiff herein, and in favor of all of the defendants hereto except [those who were not prior defendants and the Justices of the Supreme Court of Nebraska who, although prior defendants, were not previously charged as liable in damages] upon all of the plaintiff’s claim herein, insofar as it rests upon facts that existed when the ruling in *Rhodes v. Houston* * * * was made.” 225 F. Supp. 80, 106, Cf. 225 F. Supp. 113, 128.

“The doctrine of res judicata is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. Thus, without desiring to be repetitive of the extreme detail in which the district court examined the pleadings, this court shall reexamine them to the extent necessary to determine if either res judicata or stare decisis applies thereto.

“This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:

“ “ “The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 * * *’ *Englehardt v. Bell & Howell Co.*, 8 Cir., 327 F.2d 30, 32.* * *

“The cases we are considering, and Houston allege similar conspiracies under the same Civil Rights Act. * * *

“This court reiterated the applicable rule of res judicata in *Englehardt*:

“ “The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided.’ 327 F.2d 30, 32.

“Judge Delehant correctly determined that the causes of action here asserted are the same as asserted in Houston and that the added facts here pleaded do not make this a different cause of action. The basic wrong for which redress is asked is a conspiracy resulting in plaintiff’s alleged wrongful conviction and imprisonment. * * *

“Plaintiff argues on appeal as he did below that *res judicata* cannot apply in these cases because the decision in *Houston* was not on the merits but merely a motion to dismiss. The authorities cited by Judge Delehant at 225 F. Supp. 80, 105, adequately dispose of this argument and they establish that judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of *res judicata* in a subsequent action. Judge Sanborn in *Sylvan Beach, Inc. v. Koch*, 8 Cir., 140 F.2d 852, 860, quoted from Freeman on Judgments, 5th Ed., Vol. 2 §740 where it was stated that ‘A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings.’ See *Florasynt Laboratories v. Goldberg*, 7 Cir., 191 F.2d 877; 2 Moore’s Federal Practice Para. 12.14 at 2267. The decisions on immunity of the various defendants in *Houston* were on the merits and thus precluded re-determination in these cases as to the immunity of these prior defendants: to wit [naming all defendants who were made parties in the prior litigation]”

As can be seen from the quoted portions of the *Rhodes* case, that decision expressly holds that the fact that some new parties defendant have been added to a subsequent action (who had not been named in a prior action which had proceeded to judgment) does not prevent the doctrine of *res judicata* in favor of those parties who had been named in both the prior

and subsequent actions. This rule totally answers appellant's argument made in Opening Brief page five, without the support of any case authority whatsoever that the principle of *res judicata* is not applicable in favor of appellee Tomlin.

Contrary to appellant's argument, the *Rhodes* case expressly holds that the rule of *res judicata* is specifically applicable to bar the new action against the parties charged in both causes and it is only those parties who were merely named in a subsequent action who can not invoke the doctrine of *res judicata*.

II

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE TOMLIN ON THE GROUND THAT IT IS BARRED BY THE APPLICABLE THREE YEAR STATUTE OF LIMITATION.

The Complaint shows that the only overt act committed by Tomlin was the signing of the Petition of Mental Illness on May 8, 1961. The Complaint in this action was filed on January 24, 1966. Since well over four years had elapsed from the date of the alleged act, to the date of the filing of the Complaint, any action against appellee Tomlin is barred by the applicable statute of limitations.

California Code of Civil Procedure, Section 338(1) provides that an action other than for the recovery of real property, must be commenced within three years if

there is an action upon a liability created by statute other than a penalty of forfeiture.

It is settled law that in respect to any action brought on the ground of deprivation of civil rights in a federal district court having its situs in California, the statute of limitations is three years in that this limitations period commences to run in respect to any particular defendant from the date of the last overt act attributed to that defendant.

In *Lambert v. Conrad*, 308 F. 2d 571 (9th Circuit 1962) a complaint brought under the Civil Rights Act was dismissed by the District Court of the Southern District of California, Central Division, as barred by the statute of limitations. On Appeal, the Ninth Circuit affirmed and said at page 571:

“This appeal is from an order dismissing an action as barred by the statute of limitations. The complaint alleges a civil conspiracy under the Civil Rights Act. 42 U.S.C.A. §§ 1983, 1985. The applicable period of limitation is three years. California Code of Civil Procedure, §338(1); *Smith v. Crem-ins*, 9 Cir. 308 F. 2d 187. The last possible date from which the period could have commenced to run was that of ‘the last overt act alleged from which damage could have flowed * * *.’”

In *Smith v. Cremins*, 308 F. 2d 187 (9th Circuit 1962) cited in *Lambert*, the Ninth Circuit determined that:

“Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of limitation is that provided by the statutes of California — the state in which the present action arose and the District Court was located. The court decided that the California three year limitation statute, Code of Civil Procedure Section 338(1) which related to the actions based ‘upon a liability created by statute’ was the pertinent limitations provision.

III

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEES TOMLIN AND MATTHEWS UNDER THE PRINCIPLE OF STARE DECISIS.

In 21 C.J.S. Courts, Sec. 197, pp. 343-345, it is said:

“Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. . . .” [then follow literally a hundred citations to U.S. Supreme Court and Federal Court decisions].

In *Rhodes v. Meyer*, 334 F. 2d 709, referred in this brief under Section II, it was held that the doctrine of res judicata was applicable in favor of those parties who had been defendants in a prior cause and had recovered judgment therein and who were thereafter

named in a new and similar action. *Rhodes* further holds, that where, as occurred therein and at bar, there has also been an appeal from the earlier judgment, and an affirmation thereof by a court of last resort, the principle of stare decisis will also serve to exonerate from liability (in any later action brought on the same cause of action) all parties defendant who, as appellees in the earlier action, had received the benefit of the appellate court's decision. Moreover, *Rhodes* also holds that the same rule of stare decisis will even exonerate from liability those defendants who were only named as parties in the latter action, alone. In these respects the opinion says, at pages 716, 717:

“The trial court held that all defendants in the two actions before us, including those who were defendants in Houston and those who were not, were entitled to have their motions to dismiss sustained upon the basis of stare decisis, stating in support thereof:

“‘But after thorough study of the present file, and of the factual history to which it directs the court, *supra*, it has been, and is, considered unnecessary to premise the present ruling either upon the doctrine of res judicata, or upon its related rule of estoppel by judgment, and more appropriate to poise it upon the application of the principle of stare decisis. . . .’”

Thus the *Haldane v. Chagnon*, et al., 345 F. 2d 601, decision can be used to invoke the doctrine of stare decisis in favor of dismissal of the current Complaint.

Under the principle of stare decisis, the *Haldane* decision which dismissed the 1964 Complaint is binding on the District Court and this circumstance dictates that the current Complaint (which is based on the same cause of action) must likewise be dismissed.

IV

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE MATTHEWS ON THE GROUND OF JUDICIAL IMMUNITY.

The Complaint shows that appellee Albert D. Matthews acted at all times mentioned therein within the scope of his official duties as a Court Commissioner of the Superior Court of Los Angeles County or as Judge Pro Tem of that court, and is a judicial or quasi judicial officer and thereby immune from suit under U.S.C.A. Title 42, Section 1985(3). In *Agnew v. Moody*, 330 F. 2d 868 (9th Circuit 1964) the plaintiff brought an action under the Civil Rights Act against the judge of the Municipal Court and other defendants, in connection with plaintiff's conviction on a traffic ticket. Plaintiff's action was dismissed in the District Court and affirmed in the Ninth Circuit.

On page 869, the court said:

“We have repeatedly held that judges and quasi judicial officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act, for conduct in the performance of

their official duties. See, e.g., *Harmon v. Superior Ct.*, 329 F. 2d 154 (9th Cir. 1964; *Sires v. Cole*, 320 F. 2d 877 (9th Cir. 1963)).”

In *Haldane v. Chagnon, et al.*, 345 F. 2d 601 (9th Circuit 1965) discussed earlier, the court at page 603 said:

“Judges are immune from civil liability for acts done in the course of their official functions and we have held that the doctrine so firmly and deeply implanted in the field of Anglo-American law, is operative in actions grounded upon the Civil Rights Act. *Sires v. Cole*, 320 F. 2d 877 (9th Circuit 1963), *Harmon v. Sup. Court of State of California*, 329 F. 2d 154, (9th Circuit 1964), *Agnew v. Moody*, 330 F. 2d 868 (9th Circuit 1964); *Harvey v. Sadler*, 331 F. 2d 387 (9th Circuit 1964).”

A recent United States Supreme Court case, *Pier-son v. Ray*, C.C.H. United States Supreme Court Bulletin, page B1401, filed April 11, 1967, has upheld the doctrine of judicial immunity. In that case, petitioners brought an action against police officers and judges under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983. The action against the judge, a municipal police justice, was brought because the judge convicted the petitioners under a state statute.

The Supreme Court stated:

“We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions . . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction as this court recognized when it adopted the doctrine in *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1871)
* * *

“We do not believe that this settled principle of law was abolished by Section 1983 which makes liable ‘any person’ who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367 (1951) that the immunity of legislators for acts within the legislative rule was not abolished. The immunity of judges for acts within the judicial rule is equally well established and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.”

V

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED ON THE GROUND THAT THE MATTER HAS ALREADY BEEN HEARD AND DECIDED IN THE STATE COURT.

An action was brought by appellant herein in the Superior Court of Los Angeles County, California in Case No. 790,809 in March of 1962 against appellee Tomlin and other defendants for false imprisonment and malicious prosecution.

The action against Tomlin was based on the same set of facts as the present Complaint and charged Tomlin with preparing and swearing to a false petition for mental illness. Summary judgment was entered by the court in favor of Tomlin on April 8, 1966 on the statutory grounds that the action had no merit and that there was no triable issue of facts. Appellant herein did not appeal this judgment.

Thus, the appellant has tried his case in the State Court where summary judgment was given in favor of the appellee. Appellant then brought an action in the Federal District Court on the same set of facts where his Complaint was dismissed. Appellant then appealed to the Ninth Circuit where the District Court dismissal was affirmed. Appellant then brought a second action based on the same set of facts in the same Federal District Court. Again his Complaint was dismissed and now again he is appealing to the same Ninth Circuit. It would appear that appellant desires

to relitigate this matter ad nauseam and in fairness to the courts and litigants this matter should be laid to rest by this honorable court once and for all and the District Court order of dismissal should be affirmed.

In *Kenney v. Fox*, 132 F. Supp. 305, the plaintiff was committed to a state hospital in Michigan by a probate judge. Later, the plaintiff had the decree committing him to the state hospital declared null and void. The plaintiff then commenced a civil action in the state courts against the medical superintendent and other employees of the hospital alleging false imprisonment, abuse and improper treatment among other things. One of the defendant doctors filed a Motion to Dismiss which was granted by Judge Fox. The plaintiff then filed a Complaint against Judge Fox in the Federal District Court alleging that Judge Fox denied plaintiff due process and equal protection of the law and violated plaintiff's constitutional rights under the Fourteenth Amendment of the United States Constitution by dismissing the State Court action. The Federal District Court granted Judge Fox' motion to dismiss the action.

On Page 314, the Federal District Court stated:

“The decision by Judge Fox dismissing plaintiff Kenney's civil action against Dr. Morter and others in the Kalamazoo circuit court stands correct and as the law of that case until reversed by an appellate or higher court. If plaintiff Kenney was dissatisfied with that decision and considered

it to be erroneous, his available and proper remedy was by appeal to the Supreme Court of Michigan. If aggrieved by the decision of the Michigan Supreme Court on appeal, he could then assert his claims of violation of his constitutional and civil rights in a petition to the Supreme Court of the United States for writ of certiorari to review the decision of the Michigan court.

“Instead of pursuing his available and proper remedy by appeal to the Michigan Supreme Court, plaintiff Kenney began the present action for money damages against Judge Fox in this federal court, and he seeks to establish federal court jurisdiction by alleging as generalities and conclusions, without specification of supporting facts, that Judge Fox’ decision in the state court case was erroneous and deprived him of his constitutional and civil rights.

“To hold with plaintiff Kenney’s contentions in the present case would, in effect, mean that any litigant dissatisfied with a state court decision could relitigate his dispute in a federal court merely by alleging as a conclusion that he had been deprived of his constitutional and civil rights.”

CONCLUSION

For the foregoing reasons, appellees Tomlin and Matthews respectfully urge that the District Court properly dismissed the Complaint in respect to them and that the judgment of dismissal entered in their favor should be affirmed.

Respectfully submitted,

HAROLD W. KENNEDY,
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and

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Attorneys for Appellees
Tomlin and Matthews.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH J. SCALZO

No. 21567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N.
FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON,
WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEES CHAGNON AND FREEDMAN'S JOINT BRIEF.

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WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEES CHAGNON AND FREEDMAN'S JOINT BRIEF.

Appellees Chagnon and Freedman, jointly, but for themselves alone and for no other appellee, respectfully file this brief in answer to appellant's Opening Brief and in support of the judgment of the District Court dismissing appellant's action on the ground that it fails to state a claim upon which relief can be granted against these, and the other, appellees.

Appellant's Complaint in this cause was brought under the Civil Rights Act, for the alleged deprivation of his civil rights in relation to certain psychiatric court proceedings conducted by the Superior Court of Los Angeles County, California. In respect to appellees Chagnon and Freedman, the Complaint alleges that these appellees, attorneys at law engaged in private practice, prevailed upon a judge of the Superior Court

to commence the psychiatric court proceedings; all of which were undertaken and conducted exclusively by officers and officials of the Superior Court; wherein appellant was examined in respect to his mental competency.

In the case of *Haldane v. Chagnon, et al.*, 345 F. 2d 601, the Ninth Circuit had considered a similar complaint under the Civil Rights Act, *filed (in 1964) by the same individual who is the appellant in this cause*, with the same District Court which later adjudicated the within Complaint; which earlier complaint likewise related to the *same psychiatric court proceedings involved at bar*, and similarly charged appellees Chagnon and Freedman with “instigating” the course of these proceedings. The 1964 complaint had also been dismissed; and later, in *affirming* the judgment of dismissal, this Circuit ruled that no cause of action lay against appellees Chagnon and Freedman—who, in respect to all the acts charged by appellant, had proceeded in the role of private individuals, not acting under color of State law or authority.

Accordingly, as will hereinafter be shown in this brief under “Discussion”, by appropriate references to the Transcript of Record filed in this cause and to applicable case law and authority, *the judgment of dismissal entered herein in favor of appellees Chagnon and Freedman is correct and proper; and can be sustained on at least the following four grounds:*

1. No cause of action for the alleged deprivation of appellant’s civil rights can lie against appellees Chagnon and Freedman, attorneys in private practice and not acting under color of State law or authority.

2. The applicable statute of limitations for actions under the Civil Rights Act in respect to any particular defendant, is three years from the date of the last overt act charged against that defendant; and the Complaint herein shows on its face that the last allegedly overt act attributed both to appellee Chagnon and to appellee Freedman occurred almost *five* years prior to the date the Complaint was filed. Accordingly, the Complaint is barred, against these appellees, by the statute of limitations.

3. In his 1964 complaint, based on the same cause of action, appellant also named appellees Chagnon and Freedman as defendants. The complaint was dismissed, and judgment of dismissal entered in favor of these two appellees, and others. Thereupon the judgment of dismissal was affirmed on appeal, in *Haldane v. Chagnon, et al.*, 345 F. 2d 601. Accordingly, appellant's current Complaint against these two appellees is barred by the doctrine of *res judicata*.

4. Because the dismissal of the 1964 complaint was appealed, and thereupon affirmed by the Ninth Circuit, the decision therein affirming the dismissal is binding on the District Court herein, under the principle of *stare decisis*, and this doctrine compels a similar dismissal of the Complaint at bar.

For the foregoing reasons, hereinafter thoroughly detailed under "Discussion", appellees Chagnon and Freedman respectfully urge that the District Court has properly dismissed the Complaint at bar in respect to them, and that the judgment of dismissal entered in their favor herein should be affirmed.

DISCUSSION.

I.

The Complaint Fails to State a Claim Against Appellees Chagnon and Freedman, Attorneys in Private Practice and Not Acting Under Color of State Law or Authority, and the District Court's Dismissal of this Cause Can Be Sustained on this Ground.

It is patently obvious that the Complaint herein fails to state a claim, for the alleged deprivation of appellant's civil rights, against appellees Chagnon and Freedman, attorneys in private practice and not acting under color of State law or authority; and the District Court's dismissal of the Complaint and entry of judgment in favor of these appellees [R. 111]¹ can be sustained on this ground.

In the first instance, the Complaint (para. 3) *concedes* that appellees Chagnon and Freedman are duly licensed attorneys, engaged in the private practice of law [R. 2]:

“That at all times herein mentioned, defendants Chagnon [and] Freedman . . . were and are licensed attorneys at law, members of the bar of the United States District Court for the Southern District of California and of all the courts of California.”

Thereafter the Complaint alleges certain “overt acts” purportedly committed by appellees Chagnon and Freedman; which acts allegedly contributed toward the initial calendaring of a hearing involving appellant con-

¹All pagination given in this brief is that of the Transcript of Record.

ducted by the psychiatric department of the Los Angeles County Superior Court; which hearing was held on March 10, 1961 [R. 15]. It is this hearing, appellant alleges in Opening Brief, pages 1, 2, that purportedly:

“ . . . deprived plaintiff of right, privileges and immunities secured to plaintiff by the United States Constitution, and particularly secured to him by the Civil Rights Act, 42 U. S. C. 1985(3) and Sec. 1, Amendment 14 of the Constitution (R2) by seizing and imprisoning plaintiff without warrant or probable cause (R 3-15 incl.) denied bail (R 5, par. 14) under pretense or pretext of an absolutely void insanity ‘or mental illness’ (R 10-15 inclusive) proceeding—a complete nullity on its face, *by reason of which plaintiff sought damages under the Federal Civil Rights Act* and other relief (R 9).” (Emphasis supplied).

And, when the *Complaint* itself is examined in respect to the purported “overt acts” of appellees Chagnon and Freedman in relation to the psychiatric hearing of which appellant complains, *all that is to be found therein pleaded in this respect is the following* (All emphases supplied):

“*Overt Act No. 1* was committed on *March 8, 1961*, when Chagnon and Freedman went secretly and surreptitiously to the office of Lloyd S. Nix, one of the judges of Los Angeles Superior Court, ostensibly to discuss, *ex parte* and without notice to plaintiff, same facet of case No. MWD 724, styled *Haldane v. Haldane*, in which the said Nix had on July 6, 1960 determined to grant an inter-

locutory decree of divorce, which said interlocutory was entered on July 27, 1960”—para. 7 [R 3].

“For the specific purpose of depriving this plaintiff of Equal Protection of the Laws, the said Chagnon made unsworn false statements to Nix in the presence of and with full acquiescence by Freedman, charging that this plaintiff was violent and dangerous, thereby deliberately misleading and deceiving the said Lloyd S. Nix, judge, who thereupon telephoned Department 95, the psychiatric department of Superior Court in which he had presided, and suggested, at the urging of Chagnon and Freedman, that this plaintiff should be arrested and imprisoned on an insanity charge, euphemestically referred to as ‘mental illness,’ and that Chagnon and Freedman were being dispatched to Department 95 to institute proceedings.” —para. 9 [R. 4].

“Whereupon, Chagnon and Freedman did *on March 8, 1961* commit *Overt Act No. 2* by proceeding in Freedman’s car driven by Freedman, to the psychiatric department at the Los Angeles County General Hospital; Chagnon, who does not drive, alighted and entered the building; Freedman did nothing to dissuade her: Freedman did not withdraw from the conspiracy to deprive plaintiff of the Equal Protection of the Laws, but permitted his accomplice to proceed.”—para. 10 [R. 4].

“That *on said date—March 8, 1961—*defendant Chagnon did commit *Overt Act No. 3* by entering the building, engaging a deputy clerk of Superior Court, Bertha Kaminker, in discussion about this plaintiff and causing the said Bertha Kaminker to prepare a so-called petition under the pretext of Sections 5047 et seq Welfare & Inst. Code, which absolutely void ‘petition,’ No. 188329, Department 95—a complete nullity on its face—is attached hereto as *Exhibit A*, incorporated and made a part of this paragraph”—para. 11 [R. 4].

(*Purported “Overt Acts” 4 through 6 are alleged in the Complaint to have been committed by other defendants, entirely exclusive of appellees Chagnon and Freedman*).

“*Overt Act No. 7* occurred about *May 1961* when defendant Chagnon substituted herself out of case NWD 724 after she and Freedman had persuaded Rosamond B. Haldane that defendants Sands and Thompson take over the case. She thus left her helpless client destitute, at the absolute mercy of Sands and Thompson”—para. 17 [R. 6].

The foregoing then, constitutes the complete charge made against appellees Chagnon and Freedman, throughout the entire Complaint. And in respect to these allegations, even if they be accepted as completely true (arguendo), it is nevertheless settled law that no cause of action for the alleged deprivation of appellant’s civil rights can lie against appellees Chagnon and Freedman—who acted while they were attorneys in

private practice, and not as state functionaries proceeding under color of law—for the mere alleged “*investigation*” of the *psychiatric court proceedings*, all of which were conducted solely and exclusively by judges and other officials of a duly constituted court of law.

In *Haldane v. Chagnon, et al.*, 345 F. 2d 601 (9 Cir. 1965) a case involving the *same plaintiff as at bar*, brought against the *same two defendants Chagnon and Freedman* (and others) and based on the same facts and alleged cause of action, the Ninth Circuit said, in affirming a dismissal of the complaint and the subsequent judgment, at pages 604, 605:

“With the elimination of the defendant judges and bailiff from the case [because of judicial immunity] claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State officers, and they did not act in conspiracy with a State officer against whom appellant could state a valid claim. It follows that they did not, and could not, commit the alleged wrongful acts ‘under color of state law or authority’; hence, they are not subject to liability under the Civil Rights Act. *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948), *Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963), *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir. 1963), *Swift v. Fourth National Bank of Columbus, Georgia*, 205 F.Supp. 563 (D.C.M.D.Ga.1962). See also, *Hoffman v. Halden*, *supra* (268 F. 2d 280 (9th Cir. 1959)).”

Since the publication of the afore-cited opinion in *Haldane v. Chagnon*, the Seventh Circuit has reported

the case of *Byrne v. Kysar*, 347 F. 2d 734 (7 Cir. 1965), cert. denied in 383 U.S. 913, which is again a “white horse” case with the cause at bar.

In *Byrne*, the plaintiff’s wife and her attorney, Francis E. Schlax, instigated the plaintiff’s confinement as a mentally ill person, under the provisions of the Illinois Mental Health Code.

Subsequently the plaintiff brought an action in the District Court of Illinois against attorney Schlax, and against the examining doctors and an assistant state’s attorney who had signed the petition for confinement—on the theory that all the defendants had conspired to deprive him of his civil rights.

The District Court dismissed the complaint and refused the plaintiff’s motion for leave to file an amended complaint; and the Seventh Circuit affirmed.

In respect to the private attorney, the Seventh Circuit said, at page 736:

“ . . . Defendant Schlax’s participation in the proceeding as a private lawyer did not make him a state functionary acting under color of law within the meaning of the Federal Civil Rights Act. *Skolnick v. Martin*, 7 Cir., 317 F. 2d 855, 857. . . .”

Also in accord in dismissing a complaint for an alleged deprivation of civil rights on the part of an attorney, is *Meier v. State Farm Mutual Auto Ins. Co.*, 356 F. 2d 504 (7 Cir. 1966), cert. denied, likewise decided since *Haldane v. Gagnon*.

And see *Kenney v. Fox*, 232 F. 2d 288 (6 Cir. 1956) wherein the plaintiff was committed to a Michigan State hospital for the mentally ill. Subsequently

the commitment was actually determined to be void, because the commitment proceedings had not complied with statute (at bar it is clear that all psychiatric proceedings taken by the court authorities in respect to Haldane were regular, proper and in express compliance with statute, under the provisions of the California Welfare Institutions Code). Thereupon the plaintiff brought separate actions in the District Court against one: "Thomas N. Robinson, *an attorney, on whose alleged recommendation the commitment of plaintiff was made*" (p. 289—emphasis supplied); and against the deputy sheriff who had prepared the petition for the commitment and the trial judge who had ordered the commitment—on the ground that all of these defendants had violated his civil rights.

The Sixth Circuit affirmed the judgment in favor of all the defendants; and *in respect to the attorney who had allegedly recommended that the petition for commitment be filed*, the Court said, at pages 289, 290:

"The district court sustained the motions of all the defendants to dismiss for the reasons stated by District Judge Kent in his carefully prepared opinion in *Kenney v. Hatfield*, D.C.W.D. Mich, 132 F. Supp. 814. The facts, being adequately stated there, will not be repeated here. . . . We are in accord with his reasoning, 132 F. Supp. 817, that *Robinson, a private practitioner, in preparing the papers filed as the first step in the proceedings resulting in Kenney's commitment to the Kalamazoo State Hospital, was not amenable to an action based on the civil rights statute*. See *Whittington v. Johnson*, 5 Cir., 201 F. 2d 810, 811, cited in the opinion of the United States District Judge." (Emphasis added).

The opinion of the trial court with which the Sixth Circuit indicated accord, *Kenney v. Hatfield*, 132 F. Supp. 814, was as follows, in respect to the attorney defendant, at page 817:

“As to the defendant, Thomas N. Robinson, the allegations of plaintiff’s complaint are to the effect that said defendant, then an attorney in private practice, advised Deputy Sheriff Pugh in connection with the preparation of the petition which was filed as the first step in the proceedings which resulted in plaintiff’s commitment to the Kalamazoo State Hospital. *There is no allegation that the defendant Robinson was acting in any official capacity or that any of his acts, proper or improper, could be classed as the acts of the State of Michigan*, except as the petition was made allegedly pursuant to the provisions of the statutes of the State of Michigan. *No case has been discovered wherein the Civil Rights Statute, on which plaintiff bases his action, has been held to give one in the position of the plaintiff an action against a private individual not acting ‘under color of law’ for wrongs done*, even though the acts of such individual may have ultimately resulted in a deprivation of constitutional rights, privileges or immunities. Rather such statute appears to have been limited in application to persons who have used or misused the powers granted to them by virtue of political offices, held by them, for the purpose of *wilfully* depriving a person of constitutional rights, privileges or immunities. *Williams v. Yellow Cab Co. of Pittsburgh*, 3 Cir. 1952, 200 F. 2d 302; *Shemaitis v. Froemke*, 7 Cir., 1951, 189 F. 2d 963; *Watkins v. Oaklawn Jockey Club*, 8 Cir., 1950, 183 F. 2d 440.

“As stated in *Whittington v. Johnston*, 5 Cir., 1953, 201 F. 2d 810, at page 811—

‘It is a non sequitur to say that merely by instituting the lunacy proceedings, the defendants “caused” plaintiff to be deprived of her right to due process within the meaning of 8 U.S.C.A. § 43. [Now 42 U.S.C. 1983]. If there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants. Whether or not notice should be given is committed by the Alabama statute to the discretion of the probate judge. These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice.’

“It appears to this court that the reasoning set forth in the quotations applies to the claims asserted by the plaintiff against the defendant, Thomas N. Robinson.

“It is the conclusion of this court that the allegations of fact and the statute on which this action is based do not permit the granting of relief for the actions of persons acting as private citizens.” (Emphasis partially supplied.)

In *Whittington v. Johnston*, 201 F. 2d 801 (5 Cir. 1953), cited by the *Kenney* trial judge, the plaintiff had likewise filed a complaint in which she alleged that the defendants, private citizens, had: “conspired to, and did, cause plaintiff to be declared insane by an Ala-

bama probate court when she was in fact sane, and caused her to be confined for five days in a county jail awaiting commitment to a mental institution” (pp. 810, 811). The trial court dismissed the complaint and in affirming the judgment the Fifth Circuit said, at page 812:

“ . . . 8 U.S.C.A. Sec. 43 [now 42 U.S.C. 1983] . . . *does not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, nor for the acts of the state officers in administering it.*

“ . . . Neither the Fourteenth Amendment nor the Civil Rights Acts purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrongs is left with the states (Citations)” (Emphasis added).

Again, in *Cooper v. Wilson*, 309 F. 2d 153 (6 Cir. 1962), the plaintiff alleged that the defendant attorney had made false statements against her in a sanity hearing, as the result of which she was committed to a mental institution, and that thereby she had been deprived of her civil rights. The trial court dismissed the complaint, and in affirming, the Sixth Circuit said, at page 154:

“Appellee, acting as a private lawyer, charged with making false statements in sanity proceedings which resulted in appellant’s commitment to Longview State Hospital, a mental institution, was not amenable to action based on civil rights statute.”

See, also, the cases of *Skolnick v. Martin* and *Skolnick v. Spolar*, 317 F. 2d 855 and 317 F. 2d 857,

respectively (7 Cir. 1963), cited in *Haldane v. Chagnon*, wherein the same plaintiff brought separate actions against certain attorneys who he claimed had deprived him of his civil rights by their activities in favor of the plaintiff's opponent in a state court litigation. The district court dismissed the complaint, and in affirming the Seventh Circuit said, at page 857:

“Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts.”

Appellant cites more than 65 case names in his Opening Brief, purportedly in support of his position. Yet, appellate counsel who is preparing this brief on behalf of appellees Chagnon and Freedman has actually examined *every single opinion cited by appellant*; and upon the basis of such thorough examination and review can say, with absolute sincerity, that *not even one such opinion is in point with the cause at bar*—excepting, of course, for the case of *Haldane v. Chagnon, et al.*, 345 F. 2d 601, which is very much in point.²

Of course, as has been shown herein, the *Haldane* case can hardly bring any comfort to appellant; and, in-

²With the exception of the *Haldane* case (which is, of course, entirely unfavorable to appellant) not even one other case cited by appellant involves attorneys at law, who, acting as private citizens, “instigated” any psychiatric court, or any other type of court, proceedings. Indeed, most of appellant’s cited cases do not even involve actions under the Civil Rights Act (many were actually decided prior to the enactment of the 14th Amendment); and those that do primarily relate to the deprivation of the civil rights of Negroes (appellant is a white person), solely because of their race. Moreover, some of appellant’s cases actually *affirm* a District Court’s dismissal of a complaint for failure to state a claim against a defendant.

deed, he only cites it to argue that it was “erroneously decided” (Op. Br. p. 4), “wrongly decided” (Op. Br. p. 9) and “should be overruled” (Op. Br. p. 20).

Appellant fails to cite even a single authority in support of his attack on the *Haldane* decision; and from the tenor of his comments about the case, it can only be assumed that he has evolved his belief that it is “erroneously and wrongly decided” only on the basis of a purely personal and subjective element: the fact that the opinion affirms a judgment *against* him.

It is a concomitant principle, pronounced in conjunction with the one that holds that a litigant is entitled to his day in court, that once the litigant has *had* that day, and has been accorded a fair hearing and the proper right of appeal (as has occurred at bar) *there must finally be an end to the litigation*.

II.

The Dismissal of this Cause Can Also Be Sustained on the Ground that It Is Barred by the Applicable Three-Year Statute of Limitations.

It is also patently clear, from the face of the Complaint filed in this cause, that the within action against appellees Chagnon and Freedman is barred by the *statute of limitations*; and the District Court’s act of dismissing the Complaint and entering judgment in favor of these appellees can be sustained on this ground.

As has heretofore been shown in the discussion under Section I of this brief, the Complaint specifically pleads that “Overt Act No. 1 (charged against both appellees Chagnon and Freedman) “was committed on *March 8, 1961*” (Cplt. para. 7); that “Overt Act No. 2” (charged against both appellees Chagnon and Freedman) was

committed on the same day—*March 8, 1961* (Cplt. para. 10); that “Overt Act No. 3” (charged against appellee Chagnon, only) was committed on the same day—*March 8, 1961* (Cplt. para. 11); and that “Overt Act 7” (charged against appellee Chagnon, only) was committed “about May, 1961” (Cplt. para. 17).

And these are, of course, the only “overt acts” of which appellees Chagnon and Freedman are accused.

Indeed, the Complaint even shows on its face that the very psychiatric court hearing which is the subject matter of appellant’s within action was held on *March 10, 1961* (Cplt. para. 15 [R. 5] and one Exhibit to the Complaint [R. 15]).

Yet the Complaint herein was filed on *January 23, 1966* [Transcript of Record, index]—almost *five years* after the alleged commission of all the aforesaid purported “overt acts” by appellees and the date of the very psychiatric court hearing of which appellant complains.

And it is settled law that *in respect to any action brought on the ground of deprivation of civil rights in a Federal District Court having its situs in California, the statute of limitations is three years; and that this limitations period commences to run, in respect to any particular defendant, from the date of the last overt act attributed to that defendant.*

In *Lambert v. Conrad*, 308 F. 2d 571 (9 Cir. 1962), a complaint brought under the Civil Rights Act was dis-

missed by the District Court of the Southern District of California, Central Division, as barred by the statute of limitations. On appeal the Ninth Circuit affirmed, and said at pages 571, 572:

“This appeal is from an order dismissing an action as barred by the statute of limitations. *The complaint alleges a civil conspiracy under the Civil Rights Act, 42 U.S.C.A. §§ 1983, 1985. The applicable period of limitation is three years. California Code of Civil Procedure, § 338(1); Smith v. Cremins, 9 Cir., 308 F.2d 187. The last possible date from which the period could have commenced to run was that of ‘the last overt act alleged from which damage could have flowed * * *.’ Hoffman v. Halden, 268 F.2d 280, 303 (9th Cir. 1959) (issue not affected by Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)). The last overt act alleged was the filing by appellee police officers of a charge against appellant for failure to register as a convicted felon as required by Sections 52.38 to 52.43 of the Municipal Code of the City of Los Angeles. The records of other courts in related proceedings, which we may notice for this purpose (St. Paul Fire & Marine Ins. Co. v. Cunningham, 257 F.2d 731 (9th Cir. 1958), conclusively establish that this act occurred more than three years prior to the filing of the present complaint. See Lambert v. People of State of California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228 (1957); Lambert v. Municipal Court of Los Angeles County, 53 Cal.2d 690, 3 Cal.Rptr. 168, 349 P.2d 984 (1960); vacating 343 P.2d 81, which vacated 334 P.2d 605. ‘[S]ince injury and damage can only flow from overt acts,’ the complaint is not saved by a general allegation that the conspiracy continued to a date within the limitations period. Hoffman v. Halden, supra, 268 F.2d at 303.” (Emphasis supplied).*

In *Smith v. Cremins*, 308 F. 2d 187, 98 A.L.R. 2d 1160 (9 Cir. 1962), cited in *Lambert*, the Ninth Circuit had determined that: "Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of limitation is that provided by the statutes of California—the state in which the present action arose and the District Court was located." (p. 189); and had decided that the California *three year* limitations section, Code Civ. Proc. Sec. 338(1), which related to actions based "upon a liability created by statute", was the pertinent limitations provision.

Also *in accord* with the rule of *Lambert*: that an action for deprivation of civil rights is barred by the statute of limitations which is in effect in the State which is the situs of the District Court hearing the action, and that the statute commences to run from the date of the last overt act, are *the following cases—in all of which complaints based on the Civil Rights Act were dismissed by the District Court and the dismissals affirmed on appeal*:

Swan v. Board of Higher Education of City of New York, 319 F. 2d 56 (2 Cir. 1963)—complaint barred by the applicable six-year statute of the State of New York;

Crawford v. Zeitler, 326 F. 2d 119 (6 Cir. 1964)—complaint barred by the applicable one-year statute of the State of Ohio;

Minchella v. Estate of Skillman, 356 F. 2d 52 (6 Cir. 1966), cert. denied—complaint barred by the applicable two-year statute of the State of Michigan.

III.

**The Dismissal of This Cause Can Also Be Sustained
Under the Doctrine of Res Judicata.**

Moreover, it is also obvious that *the Complaint herein*; insofar as it purports again to name appellees Chagnon and Freedman as defendants, as did the 1964 complaint, in relation to *the same cause of action* which was the subject matter of the earlier complaint (now pursued to final judgment); *is now barred*, as to these two defendants, by the doctrine of *res judicata*. And the action of the District Court in dismissing the within Complaint and entering judgment in favor of these two defendants can be sustained on that ground.

On March 5, 1964, appellant herein commenced an action in the United States District Court, So. District of California, Central Division, being case number 64-293-CC [R. 32-43]. In said action, appellant likewise named as defendants Wilhelmina Helen King Chagnon and Horace N. Freedman, *the same individuals* who are named as defendants in the cause at bar.

As can be seen from an examination of the 1964 complaint, and the exhibits thereto, appellant similarly urged therein, as he does in the current Complaint at bar, that he was deprived of his civil rights by reason of *the very same* psychiatric court proceedings which are *the subject matter of the current Complaint*.

In respect to defendants Chagnon and Freedman, appellant likewise alleged in the 1964 complaint, in paragraph VII thereof [R. 34, lines 3-6], that these defendants "instigated" the commencement of the psychiatric court proceedings, by prevailing on Judge Nix of the Los Angeles Superior Court to undertake these pro-

ceedings—*precisely as appellant now again pleads in the current Complaint*, in paragraphs 7 and 9 [R. 3 and R. 4, respectively].

After the filing of the 1964 complaint, on May 12, 1964, the District Court dismissed the action, and in its judgment [R. 44-45], said, in respect to defendants Chagnon and Freedman [R. 44, line 31, to R. 45, line 1]:

“... it is clear from the allegations that defendants, Wilhelmina Helen King Chagnon and Horace N. Freedman, were not acting under color of authority of any law.”

On May 21, 1964, appellant gave notice of appeal from this prior judgment of dismissal; and on May 5, 1965, as heretofore shown, the Ninth Circuit, in *Haldane v. Chagnon, et al.*, 345 F. 2d 601, affirmed the dismissal, in respect to appellants Chagnon and Freedman and the other named defendants.

In 50 C.J.S. *Judgments*, Sec. 592, page 11, it is said:

“The doctrine of *res judicata* . . . embodies two main rules which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal . . . (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the

parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same. . . .”

In the “at all fours” case of *Rhodes v. Meyer*, 334 F. 2d 709 (8 Cir. 1964), cert. denied, the plaintiff had similarly brought an action under the Civil Rights Act, in which he had named certain defendants, *including attorneys*.

The District Court had dismissed the complaint, on the ground that it did not state a claim against any of defendants; and *the dismissal was affirmed on appeal*, in *Rhodes v. Houston*, 309 F. 2d 959 (8 Cir. 1962).

Subsequently the same plaintiff brought a new action under the Civil Rights Act in the same District Court, and again named *many of the same defendants* who had already recovered a favorable judgment of dismissal in the prior action (although the later complaint also named other, and new defendants).

The District Court dismissed the second action in favor of all the defendants who had prevailed in the prior judgment, with reliance on the doctrine of *res judicata* (and likewise dismissed in favor of all the newly named defendants, under the principle of *stare decisis*).

On appeal from the second and subsequent dismissal, the Eighth Circuit affirmed, and said, at pages 712, 713, 716:

“The defendants in *Meyer* and *Van Steenberg* who were also defendants in *Houston* asserted the defense of *res judicata* in their various motions to dismiss and such defense is maintained in these appeals. After a thorough, and we believe accurate,

examination and comparison of each of the actions below with *Houston*, Judge Delehant [the District Court judge] concluded:

“ “[T]his court would be on solid ground if it were to regard *Rhodes v. Houston* * * * as dispositive adversely to the plaintiff herein, and in favor of all of the defendants hereto except [those who were not prior defendants and the Justices of the Supreme Court of Nebraska who, although prior defendants, were not previously charged as liable in damages] upon all of the plaintiff’s claim herein, insofar as it rests upon facts that existed when the ruling in *Rhodes v. Houston* * * * was made.” 225 F. Supp. 80, 106, Cf. 225 F. Supp. 113, 128.

“The doctrine of *res judicata* is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. Thus, without desiring to be repetitive of the extreme detail in which the district court examined the pleadings, this court shall reexamine them to the extent necessary to determine if either *res judicata* or *stare decisis* applies thereto.

“This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:

“ “The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 * * * ” ’ *Englehardt v. Bell & Howell Co.*, 8 Cir., 327 F.2d 30, 32. * * *

*"The cases we are considering, and Houston allege similar conspiracies under the same Civil Rights Act. * * **

"This court reiterated the applicable rule of res judicata in Englehardt:

" 'The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided.' 327 F.2d 30, 32.

"Judge Delehant correctly determined that the causes of action here asserted are the same as asserted in Houston and that the added facts here pleaded do not make this a different cause of action. The basic wrong for which redress is asked is a conspiracy resulting in plaintiff's alleged wrongful conviction and imprisonment. * * *

"Plaintiff argues on appeal as he did below that res judicata cannot apply in these cases because the decision in Houston was not on the merits but merely on a motion to dismiss. The authorities cited by Judge Delehant at 225 F.Supp. 80, 105, adequately dispose of this argument and they establish that *judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of res judicata in a subsequent action.* Judge Sanborn in *Sylvan Beach, Inc., v. Koch*, 8 Cir., 140 F.2d 852, 860, quoted from *Freeman on Judgments*, 5th Ed., Vol. 2

§740 where it was stated that ‘A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings.’ See *Florasynth Laboratories v. Goldberg*, 7 Cir., 191 F. 2d 877; 2 Moore’s Federal Practice Para. 12.14 at 2267. *The decisions on immunity of the various defendants in Houston were on the merits and thus preclude re-determination in these cases as to the immunity of these prior defendants: to wit [naming all defendants who were made parties in the prior litigation]”* (Emphasis supplied).

As can be seen in the above italicized portion of the citation from *Rhodes*, that decision expressly holds that the fact that some new parties defendant have been added to a subsequent action (who had not been named in a prior action which had proceeded to judgment) does not prevent application of the doctrine of *res judicata* in favor of those parties who *had* been named as defendants in *both* the prior and subsequent actions. This ruling totally answers appellant’s argument, made in Opening Brief, page 5, without the support of any case authority whatever, that the principle of *res judicata* is not applicable in favor of appellees Chagnon and Freedman; because, although these two are named as party defendants in both the 1964 action and the cause at bar, some of “the parties are different” in the current cause—in that some new party defendants, who were not named in the 1964 action, are now included in the current Complaint.

Contrary to appellant’s argument, the *Rhodes* case expressly holds that the rule of *res judicata* is *specifically applicable* to bar the new action against the parties

charged in *both* causes; and it is only those parties who were merely named in the subsequent action, and not in the earlier, who cannot invoke the doctrine of *res judicata*.

Further, on the issue of *res judicata*, see, also, *Crawford v. Zeitler*, 326 F. 2d 119 (6 Cir. 1964), likewise a civil rights action, wherein the plaintiff first brought an action in a District Court of Michigan, and thereafter, after this was dismissed for failure to state a claim, brought another action, against the same defendants, in the District Court of Ohio—each time alleging the same general cause of action (though in different language).

The Ohio District Court dismissed the second cause on the ground of *res judicata*, and the Sixth Circuit affirmed; saying at page 121:

“3. *Res Judicata*

“Attached to defendant’s motion to dismiss were copies of the papers that constituted plaintiff’s complaint in the action brought in the Western District of Michigan and which complaint was held in that case not to state a cause of action. *While such complaint was constructed differently and did not employ language identical to the complaint before us, a fair reading of both complaints discloses that as to the defendant-appellee, Zeitler, they both assert the same cause of action.* The Michigan complaint relied on the same civil rights statute as involved in the case at bar. Basic to both are the asserted torts of false arrest, illegal search and seizure and other vaguely described conduct difficult to classify. Defendant-appellee Zeitler, named

as a defendant in the Michigan action and served with process, moved to dismiss the action on the ground of lack of jurisdiction over his person and the complaint's alleged failure to state a cause of action. The District Court sustained Zeitler's motion on both grounds, stating, 'Plaintiff fails to state a claim upon which the monetary relief sought could be granted against defendants * * * Zeitler * * * under the Federal civil-rights statute hereinbefore cited.' *Crawford v. Lydick*, 179 F.Supp. 211, 213. The fact that the District Judge dismissed the Michigan case on jurisdictional grounds as well as on the merits, does not prevent the Michigan decision on the merits from being *res judicata* of the cause of action attempted to be relitigated here. *Florida Central Railroad Company v. Schutte*, 103 U.S. 118, 143, 26 L.Ed. 327, 336. See cases gathered in the annotation at 133 A.L.R. 846."

IV.

The Dismissal of This Cause Can Also Be Sustained Under the Principle of *Stare Decisis*.

Finally, the within cause is barred in favor of all the defendants named herein—thus, of course, including appellees Chagnon and Freedman—on the basis of the doctrine of *stare decisis*; and the action of the District Court in dismissing the Complaint and entering judgment in favor of these appellees can be sustained on this ground.

Heretofore in this brief, appellees Chagnon and Freedman have cited the case of *Haldane v. Chagnon, et al.*, 345 F. 2d 601, wherein the judgment of dismissal en-

tered in appellant's 1964 action was affirmed by the Ninth Circuit.

Previously in this brief the first *Haldane* case was cited primarily for its language demonstrating that appellees Chagnon and Freedman, as attorneys in private practice, could not be subject to liability under the Civil Rights Act.

In addition, however, the *Haldane* decision serves to support the invocation of the doctrine of *stare decisis* in favor of the dismissal of the current Complaint. Under this principle, this decision—which held that the 1964 complaint must be dismissed—is binding on the District Court—and *this circumstance dictates that the current Complaint* (which, as has been shown, is based on the same cause of action) *must likewise be dismissed*.

In 21 C.J.S. *Courts*, Sec. 197, pp. 343-345, it is said:

“Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. . . .” [then follow literally a hundred citations to U.S. Supreme Court and Federal Court decisions].

In *Rhodes v. Meyer*, 334 F. 2d 709, the civil rights case heretofore reviewed in this brief under Section III, it was held (as shown) that the doctrine of *res judicata* was applicable in favor of those parties who had been defendants in a prior cause, and had recovered

judgment therein, and who were thereafter named in a new and similar action. *Rhodes further holds*, that where, as occurred therein and at bar, there has also been *an appeal* from the earlier judgment, and an affirmation thereof by a court of last resort, *the principle of stare decisis will also serve to exonerate from liability (in any later action brought on the same cause of action) all parties defendant who, as appellees in the earlier action, had received the benefit of the appellate court's decision.* Moreover, *Rhodes* also holds that the same rule of *stare decisis* will even exonerate from liability those defendants who were only named as parties in the latter action, alone. In these respects the opinion says, at pages 716, 717:

“The trial court held that all defendants in the two actions before us, including those who were defendants in Houston and those who were not, were entitled to have their motions to dismiss sustained upon the basis of *stare decisis*, stating in support thereof:

“ ‘But after thorough study of the present file, and of the factual history to which it directs the court, *supra*, it has been, and is, considered unnecessary to premise the present ruling either upon the doctrine of *res judicata*, or upon its related rule of estoppel by judgment, and more appropriate to poise it upon the application of the principle of *stare decisis*. . . . ’ ”

Conclusion.

For the foregoing reasons, appellees Chagnon and Freedman respectfully urge that the District Court properly dismissed the Complaint in respect to them, and that the judgment of dismissal entered in their favor should be affirmed.

Respectfully submitted,

JARRETT & WOODHEAD,
Attorneys for Appellee Chagnon
and

BRILL, HUNT, DEBUYS & BURBY,
Attorneys for Appellee Freedman.

By ABE MUTCHNIK,
Admitted to practice before the
Ninth Circuit.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ABE MUTCHNIK

No. 21567

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N.
FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON,
JR., WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE SANDS' BRIEF.

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JR., WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE SANDS' BRIEF.

Discussion.

Appellee Sands files this Brief in response to Appellant's Opening Brief and in support of the District Court's Judgment dismissing the cause for failure to state a claim upon which relief can be granted against all defendants including this Appellee.

The Complaint herein charges the defendants with a conspiracy to deprive Appellant of his civil rights in connection with certain divorce proceedings. All of the defendants except Albert D. Matthews and Wilfred H. Tomlin were and are attorneys at law and at various times represented Appellant's wife in the divorce action. Appellee Sands is alleged to have been substituted as one of the attorneys for Rosamond B. Haldane in May

of 1961, and thereafter is alleged to have participated in the conspiracy by obtaining an order for attorney's fees in the divorce proceeding and causing the entry of the final judgment of divorce. Appellee Sands was not a defendant in the case of *Haldane v. Chagnon, et al.*, 345 F. 2d 601 in which this Court affirmed a Judgment of Dismissal by the District Court of a Complaint arising out of the same divorce action as is mentioned in the present action.

As will be shown hereinafter under the heading "ARGUMENT", the Judgment of Dismissal heretofore made and entered by the District Court is entirely correct and proper. The judgment should be affirmed on the following grounds:

1. No claim can be stated under the Civil Rights Act for activities of an attorney engaged in purely private litigation and not acting under color of state law or authority.
2. The claim of Appellant is barred by the applicable statute of limitations.
3. The claim of Appellant as against Appellee Sands is barred by the doctrine of *res judicata* or collateral estoppel.

ARGUMENT.

I.

The Complaint Fails to State a Claim Under the Civil Rights Act Against Appellee Sands as an Attorney Engaged in Private Litigation and Not Acting Under Color of State Law or Authority.

It is clear from the Complaint itself [R. 2] that Appellee Sands was at all times acting as an attorney at law engaged in private litigation and not acting under color of state law or authority. It is alleged:

“That at all times herein mentioned defendants . . . Sands . . . were and are licensed attorneys at law, members of the bar of the United States District Court for the Southern District of California and of all the courts of California.” [R. 2].

The Complaint then recites certain “overt acts” allegedly committed by Appellee Sands commencing with the substitution of Appellees Sands and Thompson as attorneys for Rosamond B. Haldane in the place of Appellees Chagnon and Freedman [par. 18, R. 6]. The other “overt acts” charged against Appellee Sands can be summarized as including an application for attorney’s fees, recording a judgment for attorney’s fees and causing the final judgment of divorce to be entered [pars. 20, 21 and 23 R. 6-7].

The so-called “overt acts” of Appellee Sands are characterized as constituting personal wrongs against Appellant. However, from the mere reading of the complaint they are nothing more than the ordinary procedures followed in any divorce action. The alleged “overt acts” are clearly the activities of an attorney engaged in private litigation and certainly not acting

as a state officer or under color of state law or authority. Such activities, even though allegedly wrongful, do not support an action under the Civil Rights Acts.

As was stated in *Spriggs v. Pioneer Carissa Gold Mines*, 251 F. 2d 61 (10th Cir. 1957) when the court sustained a ruling that no claim could be stated under the Civil Rights Act:

“The substance of the prolix and redundant Complaint is that the protracted State Court litigation had the designed conspiratorial effect of depriving appellant of his adjudicated property rights without due process or the equal protection of the laws. The litigation complained of is found in the reported decisions. [Citations]. It is sufficient for purposes of this appeal to state that every act complained of was done and performed in the prosecution and decision of matters in a court of competent jurisdiction. The Court in each instance had jurisdiction of the subject matter and of the parties, and was authorized and empowered to decide the issues presented. It follows that no claim can be stated under the Civil Rights Act. [Citations]” (Pp. 61-62).

In the case of *Swift v. Fourth National Bank of Columbus, Georgia*, 205 F. Supp. 563 [USDC MD Ga. 1962] the Court stated at page 556:

“It is apparent from the complaint that the plaintiffs, or some of them, have been parties to state court litigation with results considered by them to be unsatisfactory, but it cannot be seriously contended that the lawyers who participated in the trial of these matters, nor the judges who presided over the proceedings in the State Court are state functionaries acting under color of state

law within the meaning of the Civil Rights Act. This was private litigation and the state merely furnished the forum and had no interest one way or another in the outcome.”

The basic principle with respect to the liability of attorneys under the Federal Civil Rights Acts is succinctly stated in the case of *Skolnick v. Martin*, 317 F. 2d 855 at 857

“Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts.”

See, also, in accord:

Haldane v. Chagnon, 345 F. 2d 601 (9 Cir. 1965);

Meier v. State Farm etc. Co., 356 F. 2d 504 (7 Cir. 1966).

II.

The Complaint Is Barred by the Applicable Three-Year Statute of Limitations, California Code of Civil Procedure Section 338(1).

Since there is no Federal statute fixing a period of limitation on civil rights actions, the applicable statute of the forum controls.

Crawford v. Zeitler, 326 F. 2d 119, 121 (6 Cir. 1964).

The applicable California statute provides for a three-year period of limitation under *California Code of Civil Procedure* Section 338(1).

Lambert v. Conrad, 308 F. 2d 571 (9 Cir. 1962);

Smith v. Cremins, 308 F. 2d 187, 190 (9 Cir. 1962).

In this case it is alleged that the defendant Sands was substituted into the divorce action in May, 1961. Other so-called "overt acts" are alleged in 1962 with the final one for defendant Sands alleged as taking place on January 29, 1963, when defendant Sands and Thompson "procured" the entering of a Final Judgment of Divorce. The Complaint was filed January 24, 1966, and thus if each "overt act" is taken separately any claim would be barred except with respect to the last one. However, the period of limitations would run from the last "overt act" from which damage could have flowed (*Lambert v. Conrad*, 308 F. 2d 571). The Entry of the Final Judgment is simply a ministerial act making the divorce complete so far as the status of the parties is concerned. Paragraphs 20, 21 and 22 alleging "overt acts" during 1962 when this defendant is alleged to have obtained orders for "thousands of dollars as attorney's fees" would appear to be the last overt acts from which plaintiff could have suffered damage. Thus the entire action would be barred by the three-year statute.

III.

The Present Action Brought by Appellant Haldane Is Barred by the Doctrine of Res Judicata or Collateral Estoppel.

In the prior action, the dismissal of which was affirmed in *Haldane v. Chagnon*, 345 F. 2d 601 (9 Cir. 1965), two of the present Appellees, Chagnon and Freedman, were sued on a Complaint almost identical to the one here in question for alleged conspiracy to violate Appellant Haldane's civil rights. The basis of that action was found in the same divorce action as is the basis of the present action. The prior action was

brought under the Federal Civil Rights Act as is this one. As pointed out in the Brief of Appellees, Chagnon and Freedman (Brief, pp. 19-20), said Appellees were sued in their capacity as attorneys at law and in connection with private civil litigation, that is, the Haldane divorce action. In dismissing the prior action the District Court in its Judgment stated:

“... it is clear from the allegations that defendants Wilhelmina Helen King Chagnon and Horace N. Freedman were not acting under color of authority of any law.” [R. 44, line 31, to R. 45, line 1].

In the present action Appellee Sands was named a defendant as another attorney involved in the Haldane divorce litigation. His position is identical with that of the attorneys involved in the prior action. Appellant Haldane was the plaintiff in the earlier proceedings, that the issues with respect to the position of the attorney defendants were fully litigated is amply shown by the appeal in *Haldane v. Chagnon*, 345 F. 2d 601. The issues as to the attorneys' liability under the Civil Rights Act were decided adversely to Appellant Haldane and, whether the doctrine be denominated *res judicata* or collateral estoppel, he is now barred from re-litigating these issues.

The leading case on the point is *Bernhard v. Bank of America* (1942), 19 Cal. 2d 807. There the Court stated at page 810:

“The doctrine of *res judicata* precludes parties or their privies from re-litigating a cause of action that has been finally determined by a court of Competent jurisdiction. *Any issue necessarily decided in such litigation is conclusively determined*

as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.” (Emphasis added).

Again at page 813 the Court states:

“In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication.” (Emphasis added).

See in accord:

Teitelbaum Furs Inc. v. Dominion Insurance Co.
(1962), 58 Cal. 2d 601, 604;

Zdanok v. Glidden Co., 327 F. 2d 944, 954-6
(2 Cir. 1964);

United States v. United Airlines, 216 F. Supp.
709, 724-729 (USDC Nev. 1962).

Conclusion.

On the basis of the foregoing principles, Appellee Sands respectfully urges that the Judgment of Dismissal heretofore made and entered by the District Court be affirmed.

Respectfully submitted,

MOSS, LYON & DUNN,

By CHARLES B. SMITH,
Attorneys for Appellee Sands.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

CHARLES B. SMITH

No. 21567

IN THE

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Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N.
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WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE GORDON THOMPSON'S BRIEF.

FILED

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WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE GORDON THOMPSON'S BRIEF.

Appellee Gordon Thompson, for himself alone, and for no other appellee, respectfully files this brief in opposition to appellant's opening brief, and in support of the Judgment of the District Court dismissing appellant's action upon the ground that it fails to state a claim upon which relief can be granted.

Statement of the Case.

Appellant instituted the within action in the Federal District Court on January 23, 1966. In his Complaint he alleged that all of the named appellees had participated in a conspiracy to deprive him of equal protection of the laws in violation of 42 U.S.C. Sec-

tion 1985(3) (The Civil Rights Act) and the Fourteenth Amendment of the United States Constitution.

With regard to appellees Chagnon, Freedman and Tomlin, appellant alleges, among other things, that during divorce proceedings initiated by his former wife in 1961, said appellees conspired to falsely imprison him pursuant to California Welfare and Institutions Code, Sections 5047 *et seq.* In 1964 appellant brought an action under the same section of the Civil Rights Act against said appellees, and others, and alleged the same events; however, appellant did not include as defendants Gordon Thompson, Leonard S. Sands, or Albert Matthews. The District Court in that action dismissed the Complaint for failure to state a claim upon which relief could be granted, and the Ninth Circuit Court of Appeals affirmed the decision. *Haldane v. Chagnon*, 345 F. 2d 603 (9th Cir. 1965).

The within action is basically a repetition of Mr. Haldane's previous law suit; however, certain additional facts and defendants have been added in an apparent attempt to avoid the problem of *res judicata*. Specifically, the additional facts which appellant has alleged in order to include Thompson and Sands are set forth in paragraphs 18, 20, 21 and 23 of the Complaint [R. 2]. In paragraph 18, appellant describes "overt acts" eight and nine where

"defendants Sands and Thompson substituted themselves into the case (the aforementioned divorce proceedings) at the instigation of Chagnon and Freedman in lieu of Chagnon as attorney of record, with full personal knowledge of the felonies committed on the person of plaintiff while the marriage was in full force and effect. . . ."

In paragraph 20 appellant alleges "overt acts" numbers ten and eleven where appellees Thompson and Sands "did demand and receive in Department 8 of Los Angeles Superior Court Judgments for thousands of dollars as attorneys' fees against this plaintiff, which sums were later modified drastically downward by the intermediate court in *Haldane vs. Haldane*, 210 Cal. 2d 587."

In paragraph 21, appellant describes "overt act" number twelve in which

"defendants Sands and Thompson recorded in the Official Records of Los Angeles County document 5162, book M 947, pages 651-654 inclusive, being judgment liens of \$1,500.00 principal less \$120.00 credits, before the modification in *Haldane vs Haldane*, 210 Cal. App. 2d 587. . . ."

In paragraph 23 appellant alleges "overt act" number thirteen in which Sands and Thompson procured from Judge Roger Alton Pfaff a "purported final decree based on a false affidavit" in the divorce action. Thus, the overt acts by which appellant attempts to connect appellees Sands and Thompson with the alleged conspiracy consists of:

- (1) Substitution of themselves as attorneys for Mrs. Haldane in the divorce proceedings after the alleged false imprisonment had already taken place;

- (2) Obtaining a judgment against Mr. Haldane for attorneys' fees;

- (3) Recordation of a Judgment Lien for attorneys' fees prior to the appeal to the California District Court of Appeal;

- (4) Obtaining a final decree in the divorce suit.

After appellant filed his Complaint in the within action, motions to dismiss the complaint for failure to state a claim upon which relief can be granted were filed by all defendants. The motions were granted by the District Court with prejudice as to all defendants, and it is from this Judgment of Dismissal that the appellant has appealed.

Summary of Argument.

The Judgment of Dismissal was properly granted by the District Court, and should be affirmed as to Gordon Thompson as well as all other appellees for the following reasons:

- (1) The Complaint fails to establish that the defendants were acting under color of state law;
- (2) The Complaint fails to show how the appellant was denied equal protection of the laws or equal privileges and immunities.

ARGUMENT.

I.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted in That It Fails to Establish That Any of the Defendants Were Acting Under Color of State Law.

It is uniformly held in cases in which a violation of Section 1985(3) is alleged that a plaintiff must show that the defendants acted "under color of state law or authority." *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1965); *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 1253 (1951); *Haldane v. Chagnon, supra*; *Hoffman v. Halden*, 268 F. 2d 280 (9th Cir. 1959).

Appellant has failed to make such a showing in his Complaint. Two of the alleged overt acts of Thompson involved State Court Judges. These acts were the obtaining, together with appellee Sands, of a judgment for attorneys' fees and the obtaining of a final decree in the divorce suit. It is submitted that the principal discussed in *Haldane v. Chagnon, supra*, is applicable with regard to said acts. In *Haldane*, the court pointed out that judges when acting within the scope of their authority are immune from prosecution under the Civil Right's Act. The court also makes the following statement:

"With the elimination of the defendant judges and bailiff from the case, *claims against the defendant attorneys under the Civil Right's Act cannot be stated*. The attorneys were not state officers, and they did not act in conspiracy with a state officer against whom appellant could state a valid claim. It follows that they did not, and could

not commit alleged wrongful acts 'under the color of state law or authority'; hence, they are not subject to liability under the Civil Rights Act." (emphasis added).

Appellant in his opening brief takes exception with the principle of judicial immunity, and urges that this honorable court overrule its previous decision in *Haldane v. Chagnon*, *supra*. The United States Supreme Court has recently restated the principle of judicial immunity in *Pierson v. Ray*, 35 Law Week 4342 (April 11, 1967). In *Pierson* the plaintiffs had been convicted of violating a breach of peace statute by a local Municipal Police Justice. The plaintiffs brought an action in the Federal District Court against the Justice, the Policeman who had arrested them, and others. It was charged that there had been a violation of 42 U.S.C. Section 1983, and the plaintiffs also included counts for common law false arrest and false imprisonment. The jury in the District Court found for the plaintiffs and against all defendants on all counts. The Fifth Circuit Court of Appeals reversed as to the Justice, stating that he was immune from liability under both the Civil Right's Act and under Common Law offenses. The Supreme Court stated:

"We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions . . . few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their jurisdiction . . . this immunity applies even when the judge is accused of acting maliciously and corruptly . . .

“We do not believe that this settled principle was abolished by Section 1983, which makes liable any person who under color of law deprives another person of his Civil Rights. The Legislative Record gives no clear indication that Congress meant to abolish wholesale all Common Law immunities.”

It is also contended by appellee Thompson that “overt acts” number twelve and number thirteen do not state a claim upon which relief can be granted. The act of Thompson substituting himself as an attorney of record in the divorce action could not by the wildest stretch of anyone’s imagination be construed to be an act committed under “color of state law.” No state officials were involved, and as was stated in the above quoted portion of *Haldane*, private attorneys are not state officers. Indeed, it was said *Skolnick v. Spolar*, 317 F. 2d 857 (7th Cir. 1963), that:

“Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts.”

With regard to the recordation of the judgment, when such a lien is recorded there is some participation on the part of the County Recorder. However, appellant has not charged that there was any conspiracy among the defendants Thompson and Sands and the County Recorder. Thus, a claim has not been stated under the Civil Rights Act.

II.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted in That It Fails to Establish That the Appellees Purposely Discriminated Against the Appellant, or That the Appellant Was Denied Equal Protection or Equal Immunity and Privileges Under the Law.

Assuming, *arguendo*, that somehow state action was involved in the alleged "overt acts" of Thompson, appellant still must show that the alleged conduct "subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States." *Haldane v. Chagnon, supra* at page 603. It becomes evident from a reading of the Complaint that appellant contends that he was deprived of equal protection of the law. Section 1985(3) has been held to be applicable *only* where there has been a denial of equal protection or of equal privileges and immunities, and a showing that there has been such a denial is an essential element of stating a claim under this section. *Collins v. Hardyman, supra*.

Appellant has in no way been able to demonstrate how he was deprived of equal protection. His Complaint is a mixture of legal conclusions, invective and bald assertions. Appellant apparently contends that since Negro government officials performed certain functions in his divorce case that he was discriminated against. He has made some rather bold allegations pertaining to the two Negro defendants, Tomlin and Matthews, in paragraphs 4 and 5 of his Complaint, but he has failed to show how these defendants discriminated against him either alone or in a conspiracy with Thompson or Sands.

While it is true that Rule 8(a) of the Federal Rules of Civil Procedure requires only that a Complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," it is generally held in cases involving the Civil Rights Act that mere legal conclusions are not enough. The Complaint must show what Constitutional rights were violated and how they were violated. The proposition was aptly discussed in the recent case of *Shakespeare v. Wilson*, 40 F.R.D. 500 (1966). There, a Complaint for damages for violation of the Federal Civil Rights Act was dismissed for failure to comply with the Federal Rules of Civil Procedure, Rule 8(a)(2). The court said on page 504:

"In a case such as this, where disappointed litigants in the State Courts seek to bring dozens of defendants into the Federal Courts, solely as an expression of hurt feelings and dissatisfaction with the results in state tribunals . . . the pleadings must show that the pleader is entitled to relief with sufficient clarity that a defendant is on notice of acts charged against him in order to be able to form a defense. It also means that the court will be in a position to see that there is some legal basis for recovery. This is particularly important in the Civil Rights Act area, where on scrutiny, it is often revealed that a plaintiff is trying to use the Civil Rights Act as a way of 'appealing' a State Court judgment, and where plaintiff is trying to raise solely state law claims, e.g. false imprisonment and malicious prosecution."

In *Lombardi v. Peace*, 259 F. Supp. 222 (S.D.N.Y. 1966), it was said that to state a claim within the purview of 42 U.S.C. 1985(3) that it was neces-

sary to allege facts amounting to an intentional and purposeful discrimination against the plaintiff as an individual or as a member of a class. In *Snoden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1964), the plaintiff had brought an action for damages under the Civil Rights Act, and the court stated that there must be an allegation of facts tending to show that the defendants had committed an intentional or purposeful discrimination between persons or classes. The court said at page 10:

“The lack of any allegations in the Complaint here, tending to show a purposeful discrimination between persons or classes or persons is not supplied by opprobrious epithets ‘willful’ and ‘malicious’ . . . or by characterizing (defendant’s conduct) as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the (defendant’s conduct).”

In *Dunn v. Gazzola*, 216 F. 2d 709 (1st Cir. 1954), the plaintiff, who had been convicted of child neglect and subsequently had been sent to a reformatory, charged that 42 U.S.C. Section 1985(3) had been violated by city officials in that she had not received a fair trial. The court said:

“The bare conclusionary allegations that the defendants jointly conspired for the purpose of depriving the plaintiff of equal protection of the laws and of her rights and privileges and immunities secured to the plaintiff by the Constitution and laws of the United States without any support in the facts alleged could not protect the Complaint from the Motion to Dismiss.”

Thus, although the appellant in the within action has alleged some overt acts and after each act has charged that he was denied equal protection, he has not shown any discrimination between persons or classes but has made mere conclusionary statements.

Conclusion.

For each and all of the foregoing reasons appellee Thompson respectfully urges that the District Court properly dismissed the Complaint, and that the Judgment of Dismissal entered in this action should be affirmed.

Respectfully submitted,

BOOTH, MITCHEL, STRANGE &
WILLIAN,

By DONALD W. REES,

Attorneys for Appellee Gordon Thompson.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD W. REES

No. 21572

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

IDAHO ELECTRIC COMPANY, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

IDAHO ELECTRIC COMPANY, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Idaho Electric Company, Inc., hereafter called respondent or Company, on March 16, 1966, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).¹ The Board's decision and order are reported at 157

¹ Pertinent provisions of the Act are set forth *infra* in Appendix A.

NLRB No. 70 (R. 37-38).² This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred in Jerome, Idaho, within this judicial circuit, where the Company is engaged in business.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union,³ which had been selected by a majority of its employees as their exclusive bargaining representative in a unit appropriate for collective bargaining. The Board also found that the Company violated Section 8(a)(1) of the Act by interrogating its employees regarding their Union activities and sympathies and the identity of the employee who led the Union movement in the plant by unilaterally granting wages increases to employees Burk and Castro; by unilaterally changing employees' working rules; and by threatening to with

² The original papers in the case have been reproduced and transmitted to the Court pursuant to its Rule 10(2). "R." refers to the formal documents bound as "Volume I, Pleadings," "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated ("GCX" and "RX" are to exhibits of the General Counsel and respondent, respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

³ Local Union No. 449, International Brotherhood of Electrical Workers, AFL-CIO.

law and withdrawing certain employee benefits because of the employees' Union activities. The evidence upon which the Board based its findings is summarized below.

Respondent, a General Electric Company sales franchise dealer, is engaged at Jerome, Idaho, in the operation of (1) a retail electric appliance store, (2) a general service department for servicing of electrical appliances and (3) a department for doing electrical wiring work either as a general contractor or as a subcontractor to general building contractors (R. 18-19, 24; Tr. 2, 18, 21, 23, 32-35, 38).

A few days prior to January 21, 1965,⁴ six Company electricians went to Union headquarters in Twin Falls, Idaho and conferred with Union President Ernest Lee about joining the Union (R. 21; Tr. 131-132). At this time the Company employed thirteen electricians (R. 21; Tr. 14-16, GCX 2). On January 21, nine Company electricians met with Union officials at Twin Falls and each signed a Union authorization card and an application for Union membership (R. 21, Tr. 59-62, 131, GCX 5a-5h). A few days thereafter, Union business manager Gerald Geddes called Bert Hartwell, respondent's treasurer and co-owner, and requested that Hartwell sign a contract with the Union (R. 22; Tr. 62-63); Hartwell refused to negotiate with the Union (R. 22; Tr. 63). In the week following this conversation, Geddes called the Labor Commissioner of the State of Idaho and requested that an election be conducted among Com-

⁴ Unless otherwise noted, all dates refer to 1965.

pany employees to establish the Union's majority status. Geddes was told to put the request in writing which he did (R. 22; Tr. 63-64).

About a week after the employees had first visited the Union, Hartwell asked employee James Burk, Jr. if the employees had gone to Twin Falls to inquire about joining the Union (R. 22; Tr. 112). When Burk replied in the affirmative, Hartwell asked who the ringleader was; Burk answered that he didn't know for sure (R. 22; Tr. 112). On about January 23, Alfred Hall, respondent's president and co-owner, asked employee Ralph Gardner what the employees had signed at the Union meeting on January 21 (R. 22; Tr. 130-131). Gardner told him that nine employees had signed authorization and membership cards and named the individual employees (R. 22; Tr. 131). Gardner wrote each name on a list (Tr. 131-132). Hall then inquired which of the employees had gone to the Union the first time to inquire about joining. As Gardner named the six employees, Hall checked their names from the list, he had just compiled (R. 22; Tr. 132). Hall further inquired whether employee Bruce Rosen was the leader of the Union movement and Gardner replied he was not (R. 22; Tr. 132). When Hall asked what Gardner expected "to get out of the Union," Gardner replied "it would be a better shop" if the Company was unionized (R. 22; 132).

On about January 28, President Hartwell commented to employee Gordon Bullock, "I hear you fellows had a big Union meeting the other night;" Bul-

ck confirmed this fact (R. 22; Tr. 140). Hartwell further told Bullock that he had first heard of this matter when Union business agent "Geddes called me up and said you guys all signed up. I don't know how much of what he says I can believe but I thought I would ask." Bullock replied that, "I don't know what he told you, but if he said we signed up to join the Union, I know that much is true" (R. 22; Tr. 140). Hartwell also asked if Bullock thought a Union shop would make it in their area, to which Bullock replied, "I do, there are other union shops that seem to be making it." (R. 22; Tr. 140) Hartwell concluded this conversation by inquiring "Who started this?" Bullock answered that he did not think any individual started it. "A group of us got together and decided the best thing for us to do would be to belong to a Union" (R. 22; Tr. 140).

During the latter part of January, co-owner Hall assembled employees Wilford Allison, Howard Bevens, Gardner and Rosen in the back room of the store (R. 22; Tr. 92, 133, 126). Hall told these employees that if they wanted a union shop they would have one. He added, however, that if the Union should organize the plant, "there will be some changes made," including the elimination of shop picnics, boat rides, shop parties, bonuses and certain fringe benefits (R. 2-23; Tr. 92-93). Hall accused Rosen of being the Union ringleader, and told Bevens, "So far as you are concerned, if you put forth a little more effort and a little less talk you would get along a lot better" (R. 23; Tr. 93, 126).

About a week after this meeting, Hall assembled all the employees and asked "What is the difficulty?" No one answered. When Hartwell arrived about ten minutes later, he asked Hall, "What is the deal?" Hall replied, "I can't find out." The meeting was then adjourned (R. 23; 94-95).

On February 5, the Idaho Department of Labor held a secret ballot election among Company electricians (R. 23; Tr. 28). The Company had supplied a list of thirteen employees whom it considered eligible to vote (Tr. 23; Tr. 15, GCX 2). Hartwell and Geddes acted as Company and Union observers respectively (Tr. 23; Tr. 28). The Union won the election 8 to 5 and was certified by the Idaho Department of Labor (R. 23; Tr. 30, GCX 3). Immediately thereafter, Geddes presented a proposed collective bargaining agreement to Hall and Hartwell. Both owners said they wanted time to consider the contract and Geddes replied he would talk to them sometime later to answer any questions they might have (R. 23; Tr. 64). When Geddes called respondent on February 8, he was told to contact respondent's counsel, Eli Weston (R. 25; GCX 6).

On February 8, Hall held an employee meeting. Hall acknowledged that the Union had won the election, remarking, "you boys won with a count of 8 to 5." He then announced that "there will be some changes made around here" (R. 23; 95-96). The changes in work rules which he then announced affected the reporting and quitting time, coffee breaks, preparation and submission of daily and weekly reports, turning in shop keys, taking home Company

pick-up trucks, and carrying firearms in the pick-up trucks (R. 23; Tr. 96-98, 115-118, 128).⁵ At the end of the meeting, Hall told employee Rosen that he had filed a "coercion charge" against Rosen and told employee Bevens that he was fired (R. 23; Tr. 99, 116).

On February 8, Company counsel Eli Weston wrote to the Idaho Labor Commissioner, contesting the election. Weston alleged that Idaho law required that a hearing be held before the holding of an election and that if such a hearing had been held, the Company would have shown one employee "made serious threats to at least ten of the employees on one or two occasions." Counsel also suggested that since the Company received more than \$50,000 of materials in interstate commerce, the Company might well be subject to N.L.R.B. jurisdiction, rather than to that of the state labor department. (R. 24; RX 2)

Sometime after the election the Company raised employee Burk's wage from \$2.20 to \$2.40 an hour. About a month later, the Company gave employee Roland Castro a wage increase. In neither case did the Company notify or consult with the Union concerning the increase (R. 24; 26; Tr. 110-111, 37).

⁵ The rules put in effect the following changes which had not previously been required by the Company: work started at 8:00 a.m. and all employees were to return to the shop at 4:30 p.m.; all daily and weekly reports were to be prepared and turned in; employees were prohibited from taking Company pick-up trucks home; coffee breaks were to be taken at no more than one minute's walking distance from the job; the entire crew could not take coffee breaks together; firearms, which might be used for pheasant shooting, were not to be carried in the trucks; shop keys were to be turned in.

On February 13, Geddes went to respondent's shop and was told by Hall that respondent would not meet with him except in Counsel Weston's presence (R. 24; Tr. 65, GCX 6). On February 23, Geddes telephoned Weston and explained that he would like to discuss a collective bargaining agreement with the Company. Weston replied that "he was busy," that "he didn't have any background into the case" and that he would "call back as to when we could set down and meet" (R. 24; Tr. 66-67; GCX 6). On February 24, Geddes again called Weston who stated did not know the facts of the case yet but would endeavor to do so soon (R. 25; Tr. 67-68). On February 25, Geddes telephoned Hall and requested that a meeting be arranged with Weston to discuss a contract. Hall replied that as soon as Weston "got around to it we would meet" (R. 25; Tr. 68, GCX 6).

On February 26, Geddes wrote to Hall and Hartwell outlining all the events which had occurred since the employees designated the Union as their bargaining representative on January 21 and the Union's attempts to negotiate a contract with the Company. Geddes requested that the Company arrange a meeting with Mr. Weston present on March 1 or 3 (R. 8-9; GCX 6). In a letter of reply that same day, Weston stated that the Company believed the election had been conducted "under conditions * * * not conducive to a proper vote," and suggested a second election. The letter also indicated that "because of the question of the proper unit," the Company was requesting a hearing before the Commissioner of Labor (R. 26; RX 4).

On March 2, employee Rosen telephoned Geddes and informed him that the employees intended to strike if the Company refused to meet with the Union. Geddes advised Rosen to "keep the people on the job," that he would be there by noon the following day and that he would "again try to get a meeting with the Company" (R. 26-27; Tr. 69). Rosen inquired of Hartwell the same day if any progress was being made in arriving at an agreement. Hartwell replied there was no progress. Rosen informed Hartwell that all the employees intended to walk off the job the next day (R. 27; Tr. 100).

On March 3, at 12:30 p.m., the employees went out on strike (R. 27; Tr. 100). Hall approached them at this time and inquired whether they would return to work. Employee Bullock replied that until they got a contract they had decided not to work (R. 27; 142, 101). The employees returned their trucks and equipment to the plant. At this time Hall remarked to a group of them, "You men made your nest, now you can sleep in it. You'll hear from us." (R. 27; Tr. 102).

On March 5, Geddes called Weston and discussed having a meeting. Geddes requested that Weston arrange with the Company to have the employees report back to work on March 8 and to call him back if this arrangement was not satisfactory; Weston did not recall Geddes. On March 8, the employees reported to work. Employee Rosen explained to Hall and Hartwell that Geddes and Weston had arranged the return to work (R. 27; Tr. 74-76). Respondent said that nothing had been settled and the employees returned home (R. 27; Tr. 103).

123 NLRB 543, 544.⁸ As we show *infra*, the Board properly asserted jurisdiction in this case.

There can be no question but that on the basis of the interstate commerce facts, the Board has statutory jurisdiction over respondent. *N.L.R.B. v. Reliance Fuel Co.*, 371 U.S. 224; *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 647-648. Since the Board possesses statutory jurisdiction over respondent, "the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board." *Lucas County Farm Bureau Cooperative Association v. N.L.R.B.*, 289 F. 2d 844, 845-846 (C.A. 6), cert. denied, 368 U.S. 823. Accord: *N.L.R.B. v. Stoller*, 207 F. 2d 305, 307 (C.A. 9).

The admitted facts set forth in the Company's letter to the Idaho Commissioner of Labor reveal that the Company is engaged in both retail and non-retail operations. Thus, the letter states that "The Idaho Electric Company is actually engaged in three separate types of operations. The Company has a retail appliance store, in which they employ clerks and service men; the Company also operates a service department for local customers; and third has a department for handling contracts for wiring and other electrical contract work as a sub or general contractor" (RX 2). The testimony of the Company owners fully supports the above statements concerning the nature of their business (Tr. 18, 21, 23, 32-35, 38). The testimony further shows that during the relevant period in this case

⁸ The Board will assert jurisdiction over non-retail enterprises which have an inflow or outflow across state lines of at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81, 85.

the Company realized over \$100,000 from its electrical work at construction jobs which the Board considers the non-retail portion of the Company's operations (R. 38; Tr. 41-42). The record also shows that the Company during 1964 was involved in electrical wiring for over a dozen construction jobs (Tr. 32-35). The Company admits that it purchased goods valued in excess of \$50,000 from the General Electric Company and other suppliers in the state of Idaho who in turn had acquired such goods directly from outside the state (R. 5, 10; Tr. 42). Since these facts show that the Company is both a retail and non-retail enterprise which purchased goods originating outside the state, valued in excess of \$50,000, and that the non-retail aspect of the business is not *de minimis*, we submit that the Board properly applied its jurisdictional standard for non-retail enterprises and properly asserted jurisdiction over the Company.

II. Substantial evidence supports the Board's finding that the Company violated section 8(a) (5) and (1) of the Act by refusing to bargain with the Union which had been selected as bargaining representative by a majority of its employees

The undisputed facts in the record as shown *supra*, reveal that a majority of the Company employees in an appropriate unit of electricians joined the Union and designated it as their exclusive bargaining representative on January 21.⁹ A few days thereafter,

⁹ The Board found the appropriate unit to be all respondent's electricians including apprentices, but excluding guards and supervisors as defined in the Act (R. 20). The Company did not contest the unit at the hearing or in its exceptions to the Trial Examiner's finding. See *N.L.R.B. v. Sunrise Lumber and Trim Corp.*, 241 F. 2d 620, 624 (C.A. 2), cert. denied 355 U.S. 818).

Union agent Geddes requested the Company to sign a collective bargaining agreement with it as the representative of its employees. The Company refused. There can be no question but that in the latter part of January, the Company was fully aware of its employees' union activities and the fact that a majority of its employees had joined the Union. Thus, in its questioning of employees Gardner and Bullock, the Company learned not only that a majority had signed Union cards but it also elicited the names of the nine employees who constituted the majority. Respondent has never challenged the Union's majority status. See *N.L.R.B. v. Overnite Transportation Company*, 308 F.2d 279, 283 (C.A. 4).

Subsequent Union requests for the Company to bargain, beginning on February 5, were marked by excuses and procrastination, interspersed by the Company's commission of unfair labor practices. Thus, the record shows that when the Union presented a bargaining agreement to Hall and Hartwell on February 5, the Company owners requested time to consider the contract. On February 8, respondent told Union agent Geddes that he must discuss bargaining with Company counsel Weston. On February 13, Hall told Geddes that there could be no bargaining meeting except in the presence of counsel. On February 23, in reply to Geddes' request to meet and bargain, counsel Weston replied that "he was busy" and "didn't have the background in the case." On February 24, Weston told Geddes that he did not know the facts yet but would endeavor to learn them soon. On Feb-

January 25, co-owner Hall met Geddes' request for a bargaining meeting with the response that they would meet as soon as their counsel got around to it. On February 26, Geddes requested by letter that a meeting be arranged for March 1 or 3. Weston answered by suggesting that the recent State labor department election was improper. On March 8, Geddes again called Weston to arrange a meeting. On March 11, Geddes wrote Weston requesting a meeting to negotiate a contract. No meeting has been held. It is evident from these facts that the Company was not making a sincere, good faith effort to meet with the Union. It is well settled that an employer's refusal to meet and bargain under such circumstances, against a background of other unfair labor practices (see *infra*, pp. 17-19), constitutes a violation of Section 8(a) (5) and (1) of the Act. *N.L.R.B. v. Security Plating Company*, 356 F. 2d 725, 726-727 (C.A. 9); *N.L.R.B. v. Trimfit of California*, 211 F. 2d 206, 210 (C.A. 9); *N.L.R.B. v. Idaho Egg Producers*, 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B. v. Howard-Cooper Corp.*, 259 F. 2d 558-560 (C.A. 9); *N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 927 (C.A. 9).

Respondent contends in its exceptions to the Trial Examiner's decision that it has not violated Section 8(a) (5) and (1) of the Act because the election conducted by the Idaho Department of Labor, which resulted in an 8 to 5 victory for the Union and its certification, was "illegal, improper and contrary to both State and Federal law" (R. 33). Respondent alleges that state law required that it be afforded a hearing prior to the holding of the election and that

such a hearing was not held. In addition, respondent contends that employee Rosen threatened employees just prior to the election in an effort to force them to vote for the Union. The short answer to respondent's contention is that neither the legality of the state election nor the results of the election are at issue in the instant case. The Board has specifically noted that "it would serve no useful purpose to here resolve the question of whether or not said election was properly conducted" (R. 21) and, accordingly, the Board did not consider the results of the election in determining that the Union's majority status. The other facts upon which the Board relied, detailed *supra*, afford ample support for the Board's conclusion that when the Company refused the Union's request to bargain, the Union represented a majority of Company employees.

Respondent's contention that an alleged threat by employee Rosen immediately before the state election immunizes it from a finding that respondent refused to bargain, is equally without merit.¹⁰ Rosen denied making any threats to any employees (Tr. 109). Assuming *arguendo*, the truth of the allegation that such a threat was made, under circumstances that

¹⁰ In its letter to the State Commissioner of Labor, respondent alleged that Rosen made serious threats to at least ten of the employees in the unit on one or two occasions (RX 2). In the instant case, respondent produced two employees who testified to the alleged threat made to a few employees on one occasion (Tr. 147-150). The two witnesses testified that Rosen threatened "to bust them in the mouth" if they voted for the Union. None of the six other employees who appeared in the instant case, however, were questioned about the alleged threat.

might have affected the result of the election, this still could not justify the Company's refusal to bargain; for the Union, as the Company well knew, already represented a majority of its employees on the basis of cards signed before the alleged threat. Nor is there evidence in the record to suggest that Rosen exerted any pressure to have his fellow employees join the Union prior to the time respondent alleges Rosen made the threat. Indeed, the record indicates that Rosen was not aware that employees intended to inquire about joining the Union until he was called by his co-workers to accompany them to Union headquarters for the purpose of introducing them to Union President Lee whom Rosen knew. See *N.L.R.B. v. Overnite Transportation Company*, 308 F. 2d 279, 283 (C.A. 4). In short, there is no basis for any contention that the Union did not represent an uncoerced majority of Company employees when the Union made its request to bargain and accordingly the Company's refusal to bargain violates Section 8(a) (5) and (1) of the Act.

III. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act

While refusing to negotiate with the Union, the Company at the same time engaged in a course of conduct which interfered with, restrained and coerced employees in the exercise of their Section 7 rights and which was calculated to undermine the Union's majority. The Board's findings that this conduct violated Section 8(a)(1) are supported by substantial evidence in the record. Thus, the record shows that co-owner

Hartwell in the latter part of January questioned employees Burk and Bullock about their co-workers' interest in the Union and the identity of the Union ring-leader. President Hall quizzed employee Gardner as to which employees had initially inquired about joining the Union and which employees subsequently joined the Union. Hall further inquired whether Bruce Rosen was the leader of the Union movement. It is clear from the facts in this case that the Company was not making these inquiries for any purpose permitted by the Act but rather as part of its attempt to interfere with their employees' union activities.

Later, Hall assembled a group of employees and announced that if the Union organized the plant "there will be some changes made," including the elimination of shop picnics, boat rides, shop parties, bonuses and certain fringe benefits. About a week thereafter, when the results of the state election were known, Hall again assembled the employees, acknowledged that the Union had won the election and announced "there will be some changes made around here." At this time Hall read a list of changes in work rules which affected the reporting and quitting time, coffee breaks, preparation and submission of job reports, turning in keys and pick-up trucks and the carrying of firearms in trucks.

Sometime after the election the Company gave wage increases to employees Burk and Castro without notifying or consulting with the Union.

It is well settled that such conduct, which interferes with, restrains and coerces employees in the exercise

of their guaranteed Section 7 rights, violates Section 8(a)(1).¹¹

Respondent characterizes its activities as one or two "casual, unrelated statements" and contends that "the employer has been [found] guilty of an unfair labor practice by talking to the employees" (R. 33). The record refutes this defense on the facts; the cited cases demonstrate its inadequacy at law.

¹¹ Interrogations of employees concerning union activities and identity of leaders: *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 552-553 (C.A. 9); *N.L.R.B. v. Lozano Enterprises*, 318 F. 2d 41, 42 (C.A. 9); *N.L.R.B. v. Ace Comb Co.*, 342 F. 2d 841, 843 (C.A. 8); *N.L.R.B. v. Wings & Wheels*, 324 F. 2d 495, 496 (C.A. 3); *N.L.R.B. v. Smith*, 209 F. 2d 905 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9).

Threatening withdrawal of benefits; withdrawal of benefits: *Edward Fields Inc. v. N.L.R.B.*, 325 F. 2d 754, 760 (C.A. 2); *N.L.R.B. v. Idaho Egg Producers*, 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B. v. Hazen*, 203 F. 2d 807 (C.A. 9); *N.L.R.B. v. Dixie Gas, Inc.*, 323 F. 2d 433, 434 (C.A. 5); *N.L.R.B. v. McCarthy Motor Sales Co.*, 309 F. 2d 732, 734 (C.A. 7); *Ridge Growers v. N.L.R.B.*, 211 F. 2d 752, 755-756 (C.A. 5).

Giving wage increases without notifying bargaining representative: *Medo Corp. v. N.L.R.B.*, 321 U.S. 678, 683; *N.L.R.B. v. Hyde*, 339 F. 2d 568, 571-572 (C.A. 9); *N.L.R.B. v. Chain Service Restaurant etc.* 302 F. 2d 167, 171-172 (C.A. 2); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9), cert. denied 348 U.S. 829.

APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court:
 (Numbers are to pages of the reporter's transcript)

BOARD CASE No. 19-CA-3065

GENERAL COUNSEL'S EXHIBITS

Number	Identified	Offered	Received in Evidence
1A-1H-----	6	6	6
2-----	15	31	31
3-----	30	31	31
4-----	57	57	58
5A-5H-----	61	61	62
6-----	65	68	68
7-----	77	78	78
8-----	78	78	78

RESPONDENT'S EXHIBITS

Number	Identified	Offered	Received in Evidence
1-----	56	56	56
2-----	86	86	86
3-----	86	87	87
4-----	87	87	87
5-----	87	88	88
6-----	88	88	88
7-----	154	154	155

No. 21572

In the
**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

IDAHO ELECTRIC COMPANY, INC.

Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

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FILED

JUN 7 1967

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JUL 20 1967

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BRIEF FOR THE RESPONDENT

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<i>Lanthier Machine Works</i> , 116 NLRB 1029 ..	8
<i>Yakima-Cascade Fuel Co.</i> , 126 NLRB (No. 161) ..	9
<i>Tinley Park Dairy Co.</i> 142 NLRB (No. 86) ..	9
<i>Carolina Supplies & Cement</i> , 122 NLRB 17 ..	10

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**United States Court of Appeals
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ON PETITION FOR ENFORCEMENT OF AN ORDER OF
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BRIEF FOR THE RESPONDENT

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Idaho Electric Company, Inc., hereafter called respondent or Company, on March 16, 1966, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).¹ The Board's

¹ Pertinent provisions of the Act are set forth *infra* in Appendix A.

decision and order are reported at 157 NLRB No. 70 (R. 37-38).² This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred in Jerome, Idaho, within this judicial circuit, where the Company is engaged in business.

STATEMENT OF THE CASE

I. Section 8(a) (5) Violation

The Board found that the Company violated Section 8(a) (5) of the act by refusing to bargain with the Union. The basis of this holding by the Board and which is disputed by the respondent is the election which was held on February 5, 1965. The evidence in this case reveals that the manner in which this particular election was held is violative of Idaho Law.² This section of the Idaho Code requires that a hearing be held prior to the election. The express purpose of this provision is to determine whether or not either the employer or the Union have engaged in coercive activities which could potentially restrain the employees from an exercise of their rights under section 7 of the act. This hearing was not held. As a matter of fact, the Idaho State Department of Labor not only failed to follow the Idaho Code with regard to the conduct of an election but admitted that they were in error in the manner in which this Union was certified under Idaho Law. (Tr. Pg. 49.)

The evidence also shows that the Union organizers threatened the employees bodily violence and harm immediately before the election. (Tr. 147-150).

The testimony from both of these gentlemen indicates

²See Appendix "B"

that other of the employees other than the two employees who testified at the time of the hearing, also heard these threatening statements. (Tr. Pages 147, 156 Tr. page 150.)

II. Section 8 (a) (1) Violation

The Board found that the Company, Idaho Electric Company, Inc., violated Section 8 (a) (1) of the Act by making certain interrogation of Company employees regarding their Union activities and sympathies and the identity of the employee who allegedly led the Union movement in the plant. The Board also found that the basis of this charge was the unilateral granting of wage increase to employees Burk and Castro; changing employees working rules and threatening to withdraw and withdrawing certain employee benefits because of the employees Union activities.

However, the Record in this particular case shows that there were isolated instances of employee interrogation, and that these minor interrogations as to Union membership were not accompanied by any threats, promises or, reprisals. (Tr. Pages 122-123.) The Record will also disclose that certain changes were made in company rules after the election was held due to business conditions in the Company. (Tr. 159-160.) The evidence also discloses that the employees had even solicited the Company's opinion as to their attitudes toward the Union. (Tr. Page 114.)

The record will show contrary to the Board's finding that the unilateral granting of wage increases to Employees Burk and Castro was part of a prior wage increase planned and enacted before any attempt to organize by the labor Union. (Tr. Page 159, 163-164.)

The testimony also reveals that there was then and still is a bona fide dispute as to whether or not the Union was the lawfully elected bargaining representative. The unilateral changes in employees working rules were due to working conditions and economic conditions within the industry. (Tr. Page 159-160) The withdrawal of any employee benefit also has sound and justifiable reasons. In addition, as commented above, there was a bona fide dispute as to whether the Union was the properly certified bargaining representative.

III. JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD OVER THIS EMPLOYER.

The Respondent herein, Idaho Electric Company, Inc., is located in a small town called Jerome in Southwestern Idaho. The Respondent employs approximately seventeen persons. The business is operated by a Mr. A. V. Hall and his partner, Bert Hartwell. They have been in business for eighteen years in Jerome, Idaho.

The transcript shows that the business of the Respondent is a retail business and under the applicable decisions the jurisdictional requirements for the National Labor Relations Board is \$500,000.00 of gross annual sales. (Tr. Page 151.) The evidence in this case also establishes that the business of the Respondent is strictly a retail business in that all services or sales are to general public for their use or consumption and not for resale. (Tr. Page 22, 23, 26, 27, 40.)

Though the Board found that the Respondent purchased in excess of \$50,000.00 from firms located within the State of Idaho who in turn received said goods and merchandise directly from points located outside

of the State of Idaho, it is Respondent's contention that this standard as applied is not applicable. (Record Page 19.)

ARGUMENT

I. SECTION 8 (a) (5) VIOLATION

Briefly stated, it is Respondent's contention that since the election carried on by the Commissioner of Labor of the State of Idaho was not in accordance with the Idaho Statute regulating the same, that said election is invalid and void and that under these circumstances the Respondent has no duty to bargain with the Union. *NLRB v. West Texas Utilities Company*, 26 Labor Cases, Paragraph 68, 551, 214 Federal 2nd 732 (CA-5-1954) ; *NLRB v. Dallas City Packing Company* 230 Federal 2nd 708 (CA-5-1956) ; *NLRB v. Lord Baltimore Press, Inc.*, 300 Federal 2nd 671, (CA-4-1962).

It also been held by the Board that State conducted elections must be free of irregularities or unusual circumstances. *Blue Field Produce and Provision Company*, 117 NLRB 1660 (1967). The record in this case indicates that the State Commissioner of Labor admitted that the election was improperly held and the Union should not be certified. The testimony also disclosed that there were certain threats to the employees made by one of the Union organizers a Mr. Rosen. (Tr. Page 49, 147-150.)

Since the election is not consistent with neither State nor Federal Law Respondent owes no duty to bargain with the Union.

The trial examiner's recommended order and find-

ings bypasses this problem by maintaining that the legality of the State election nor the results of the election are at issue in the case. This proceeds upon the trial examiner's theory that he did not refer to the results of the election in determining the Union's majority status. (R. 21.) That his determination as to the majority status was on the basis of the signing of the representation cards.

The major fallacy of this particular reasoning is that:

1. Both the Union and the Employer under the law are allowed a hearing to determine the majority status for collective bargaining purposes. *NLRB v. West Texas Utilities Company, Supra*; *NLRB v. Dallas City Packing Company* and *NLRB v. Lord Baltimore Press, Inc. (Supra.)*

2. Both the Employer and the Union are guaranteed that if this election is held under State auspices, that it be conducted properly and without the background of coercion or threats. *Blue Field Produce and Provision Company, Supra.*

3. The trial examiner has over looked the possibility, which forms the basis of the legal right to a hearing before the election, that since the signing of the authorization card an employee may have changed his attitude towards Union membership. The evidence in this case would indicate that this probably actually happened. Why else would Mr. Rosen threaten the employees after receiving the authorization cards that if they didn't vote for the Union he would, "Bust them in the mouth." (Tr. 147-150)

In other words, the fact that they were uncoerced

at the time they signed the authorization cards, is essentially immaterial in that after an election is requested the question is whether or not they were coerced or uncoerced at the time of the election. It is also interesting to note that the Union representative requested the election in this particular situation. (Tr. 63-64.) This would seem to indicate that not only the Employer but also the Union had a substantial doubt as to whether the authorization cards gave them an uncoerced bargaining majority.

It is urged by respondents that once the parties request an election, the law requires that the election be held properly and without any elements of coercion present. If the trial examiner's position is sustained, it will open the door to all types of coercion prior to an election as long as authorization cards were signed. This is certainly not what was intended by Congress in enacting the Labor Management Relations Act.

If this reasoning is to be followed, it would seem by parity of reasoning that all charges against the employer relating to coercion prior to or after the election should be dismissed as being without merit, in that the Union always had a majority anyway.

II. SECTION 8 (a) (1) VIOLATIONS

Briefly, it is Respondent's contention that the activities of the employer in interrogating his employees relative to their Union membership is protected by Section 8 (c) of the Act relative to free speech and without the background of threats or promises is not unlawful per se. *Blue Flash Express, Inc.* 109 NLRB 591 (1954) ; *S. H. Kress & Company v. NLRB* (CA-9; 1963) 47 Labor Cases Paragraph 18, 219; *Wayside*

Press v. NLRB (CA-9; 1953) 206 Federal 2nd 862; *NLRB v. Rockwell Manufacturing Company* (CA-3; 1959) 271 Federal 2nd 109.

The transcript shows that the employees admitted prior to the election there were no threats or promises by the employer. (Tr. 122-123.)

The other statements alleged by general counsel and upheld by the trial examiner and the Board constitute trivial interrogation of the employees as to Union memberships and held to be not unlawful. *NLRB v. Coca-Cola Bottling Co.* (CA-7; 1964) 333 Federal 2nd 181; *NLRB v. Pecheur Lozenge Company* (CA-2; 1953) 209 Federal 2nd 393; *Lanthier Machine Works* (1956) 116 NLRB 1029. The other alleged threats or coercion constitute the company representative asking the employees if there were any problems. (Tr. 114) The other alleged threats relate to a meeting wherein it was explained to the employees by the owners that there would have to be a change in rules and regulations concerning the manner in which the plant was being operated. (Tr. 126)

With regard to the unilateral changing of employees working rules and benefits and unilateral granting of wage increases the evidence is directly contrary to the holding of the Board. The evidence shows that the wage increases were granted as an over-all part of the employers wage program, and as such is not in violation of the Act. *Mississippi Valley Structural Steel Company*, 64 NLRB 78; *Knickerbocker Plastic Company*, 96 NLRB 586. In addition, with regard to the unilateral aspect of all of these charges, until it has been determined that the Respondent has a duty to inform the Union because it is the bargaining representative, the

fact that a wage increase or decrease in benefits or change in working rules or conditions is immaterial. With regard to the change of working rules and regulations, the transcript shows that these new regulations were put in to reduce overhead. (Tr. 159-160) It was even admitted by one of the employees, Mr. Burk, that these rules were not unreasonable. (Tr. 119)

These contentions are without merit and the holding by the Board in this particular instance is not supported by the record when viewed as a whole.

III THE JURISDICTION OF THE NLRB OVER PETITIONER.

The Respondent's contention with regard to the jurisdictional aspect of this case is that Respondent's business is strictly retail sales of items of personal property and services to the general public. That none of their items are for resale. That under these circumstances the trail examiner should have imposed the jurisdictional requirements of \$500,000.00 of gross annual sales rather than the test used. The evidence in this case indicates that over 75% of Respondent's business is strictly retail sales of personal property. (Tr. Page 22, 23)

In *Yakima-Cascade Fuel Company*, 126 NLRB (No. 161) 1960 and *Tinley Park Dairy Company, dba Country Lane Food Store*, 142 NLRB (No. 80) the Board has held that where there is a mixture of retail and non-retail activities the determining factor is whether or not the major portion of the employers business is retail. In the employers business here, the transcript shows by uncontradicted testimony that 75% of

his business is retail sales. Though there are services performed, most of the services are connected with the sale of the retail items of personal property.

In the case of *Carolina Supplies and Cement Company*, 122 NLRB 17, RC Case No. 11-RC-1137 the Board stated the following with regard to its jurisdictional standards:

“The Board has decided that it will assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and *which do a gross volume of business of at least \$500,000.00 per annum*. The Board will apply this standard to the total operations of an enterprise whether it consists of one or more establishments or locations, and whether it operates in one or more states. In adopting this standard the Board has departed from its past practice of also utilizing outflow and inflow standards in aid of its jurisdictional determinations with respect to retail enterprises ***** Accordingly, in the interests of expediting the handling of the increased volume of retail cases which the Board expects will result from the liberalization of its jurisdictional policies, the Board decided to apply *only* a gross volume of business standard to such enterprises. The \$500,000.00 standard chosen by the Board should, in its opinion, reasonably insure that jurisdiction will be asserted over all labor disputes involving retail enterprises which tend to exert a pronounced impact upon commerce.”

This particular case indicates that in the event there is any retail aspect of the business that the \$500,000.00 standard will be applied. However, even if the

rule which the trial examiner followed, is applied, the major portion of the employer's business is retail, and therefore the retail standard for assumption of jurisdiction should be applied.

CONCLUSION

For the reasons stated, it is respectfully urged that a decree should not issue enforcing the board's order.

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Attorneys for Respondent

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

ELI WESTON
WESTON AND WESTON
Attorneys for Respondent

APPENDIX A

That relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

APPENDIX B

Idaho Code Section 44-701 is as follows:

“Declaration of policy—Collective bargaining.—
In the interpretation and application of this act,
the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor
should result from voluntary agreement between
employer and employees. Governmental authority
has permitted and encouraged employers to organ-
ize in the corporate and other forms of capital con-
trol. In dealing with such employers the individual
unorganized worker is helpless to exercise actual lib-
erty of contract and to protect his freedom of labor,
and thereby to obtain acceptable terms and condi-
tions of employment. Therefore it is necessary that
the individual workman have full freedom of asso-
ciation, self-organization, and designation of rep-
resentatives of his own choosing, to negotiate the
terms and conditions of employment, and that he
shall be free from the interference, restraint or
coercion of employers of labor, or their agents, in
the designation of such representatives or in self-
organization or in other concerted activities for the
purpose of collective bargaining or other mutual aid
or protection.”

N O. 2 1 5 7 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD LINCOLN WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

SEP 29 1967

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0016 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD LINCOLN WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

At approximately 8:00 A.M. on May 6, 1966, Sergeant Victor Zilinsky and Sergeant Lewis Riker of the Los Angeles Police Department went to 3332 Hyde Park Boulevard, Los Angeles, California, in the company of two uniformed police officers [R. T. pp. 15-17]. ^{1/} In the front of the building at this address was a sign reading "Home TV Service and Repair"; in the rear were living quarters [R. T. p. 16].

Sergeant Zilinsky knew that a warrant had been issued from

^{1/} R. T. refers to Reporter's Transcript.

the City of West Covina for the arrest of Harold Lincoln Ward on a charge of 476 APC, non-sufficient funds check; in fact, he had personally seen the warrant [R. T. pp. 14, 34]. Harold Lincoln Ward was also a suspect in a check forgery scheme. In late April or early May of 1966, Sergeant Zilinsky had executed a search warrant on the premises at 1525 Evanwood, La Puente, California, Ward's former address, and had found there forged money orders [R. T. p. 24]. On May 2, 1966, Ward had told officers of the Covina Police Department that he resided at the Home TV Service and Repair Shop. This information was made known to the West Covina Police Department which in turn divulged it to Officer Zilinsky [R. T. p. 37].

Sergeant Lewis and a uniformed officer gained entrance to the premises through the rear [R. T. p. 17]. Appellant unlocked the front door and let in Sergeant Zilinsky and another uniformed officer [R. T. pp. 16-17]. Sergeant Zilinsky had a general description of Harold Lincoln Ward, but this description included a beard and a mustache [R. T. pp. 18, 33]. On May 6, 1966, Appellant was not sporting either a beard or a mustache [R. T. p. 18]. Appellant denied being Harold Lincoln Ward [R. T. p. 18], and instead, claimed to be John Washington [R. T. p. 22]. Therefore, when the officers first gained entry to the Home TV Service and Repair Shop they did not believe Appellant to be Harold Lincoln Ward [R. T. p. 33].

Having identified himself as John Washington, Appellant informed the officers that Ward had gone out to breakfast some ten

minutes earlier [R. T. p. 22]. Still claiming to be John Washington, Appellant told the officers they could wait there for Ward's return and that they could search the premises [R. T. pp. 22-23]. A city business license on the wall indicated that the shop was owned by John Washington [R. T. p. 38]. Appellant fit the description of John Washington contained in the identification papers he had furnished the officers [R. T. pp. 18, 45].

In the course of the search the officers uncovered stolen travelers checks, forged money orders, false identification papers, and a coat containing money hanging on the wall [R. T. p. 24]. Still pretending to be John Washington, Appellant told the officers that the coat and money were his, but that the forged instruments belonged to Ward [R. T. pp. 24-25, 52-53].

Having waited in vain approximately thirty minutes for Ward's return, the officers decided to verify the identity of the person claiming to be John Washington [R. T. pp. 25, 45, 54-55]. Appellant was unable to give the correct birth date of John Washington as shown on the identification papers in that name and then admitted being Harold Lincoln Ward [R. T. pp. 25, 45-46]. The officers arrested Appellant on the basis of the West Covina warrant and on the additional charge of possession of forged instruments in their presence [R. T. pp. 46-47]. Until the arrest Appellant was under no physical restraint [R. T. p. 26]. After the arrest, and having been advised of his constitutional rights, Appellant admitted that the coat and money were his [R. T. p. 26]. The officers completed their search and then took Appellant to the Police

Administration Building, where he was booked at approximately 1:30 P.M. [R. T. p. 27]. The entire search lasted approximately one hour and a half to one hour and three quarters [R. T. p. 25].

At the Police Administration Building Appellant was permitted to telephone a bondsman; he stated that he did not want to call an attorney [R. T. p. 27]. It was not until the officers returned to the Police Administration Building that they learned about the bank robbery and of Appellant's probable participation in it [R. T. pp. 28-30].

Appellant testified that he did not spend the night of May 5 at the Home TV Service and Repair Shop; that he arrived there only at about 5:00 A.M. on May 6 [R. T. p. 63]. Although Appellant at first denied consenting to the search [R. T. p. 51], he did admit letting in the police and telling them they could wait there for Ward's return [R. T. pp. 63-65]. Appellant knew the police were probably looking for him and only mildly protested their search [R. T. pp. 64-65]. Although Appellant claimed the police would not let him make a telephone call, he stated that he did not tell them he wanted to [R. T. pp. 66-67]. Appellant spoke to the officers freely and of his own will [R. T. pp. 69-70]. Appellant admitted three previous felony convictions, including armed robbery, interstate transportation of forged securities, and possession of narcotics [R. T. p. 72].

On May 23, 1966, while in State custody, Appellant wrote a letter to the United States District Court. In a reply letter dated June 1, 1966, the Clerk of the United States District Court,

explained that his office had no knowledge of any Federal case involving Appellant and suggested that he contact the United States Commissioner [T. R. p. 9]. ^{2/} In a letter dated June 2, 1966, responding to Appellant's letters dated June 2 and June 4, 1966, the United States Commissioner explained that a Federal detainer had been filed against Appellant, that recommended bond in the Federal matter was \$25,000, but that the Federal matter would not proceed until the State charges had been disposed of [T. R. p. 10]. On June 8, 1966, the Federal Grand Jury returned the indictment on which Appellant was tried. Bond on that indictment was recommended at \$20,000 [T. R. p. 2]. In any event, Appellant was unable to make the Federal bond [R. T. p. 62].

Susan M. Smith testified that on May 5, 1966, she was employed as a teller at the Washington-West View branch of the Crocker-Citizens National Bank [R. T. p. 113]. At approximately 1:00 P. M., an individual approached her window and placed a hold-up note, Exhibit 1, on the counter [R. T. p. 114]. Miss Smith identified this individual as Appellant [R. T. pp. 120-121]. He was wearing on this occasion either a dirty plaid-type shirt or a workshirt [R. T. p. 124]. She started to ask Appellant where his bag was, but he cut her off, telling her to get the money quickly [R. T. pp. 130-131]. Miss Smith was positive that Appellant did not smile and that he said nothing about any bag [R. T. p. 132]. Appellant kept one hand on the counter covered by a hat and Miss

^{2/} T. R. refers to Transmitted Record.

Smith never saw what, if anything, was in the hand beneath the hat [R. T. pp. 133-134]. In giving Appellant the money, Miss Smith tripped an alarm system which took photographs of the robbery [R. T. p. 118]. She then identified these photographs, Exhibit 2, as accurately portraying what transpired [R. T. pp. 119-120]. Miss Smith further testified that she gave Appellant certain "bait money", Exhibit 3, which was kept segregated from the bank's regular funds [R. T. pp. 118-119]. As he was leaving, Appellant told Miss Smith to "Be quiet" or "Be careful" [R. T. p. 118]. Miss Smith picked up the hold-up note only when it was first presented to her [R. T. p. 137]. The police handled the note in such manner as not to damage any latent finger prints [R. T. pp. 138-139].

To discredit the testimony of Miss Smith by means of a prior inconsistent statement, Appellant called Federal Bureau of Investigation Special Agent Thomas W. Lenehan [R. T. p. 220]. However, Agent Lenehan testified that Miss Smith never told him she could see both of Appellant's hands [R. T. p. 223].

Gerald A. Blum, Assistant Manager at the Washington-West View branch of the Crocker-Citizens National Bank, testified as to the purpose and nature of the "bait money" transfer card [R. T. pp. 151-152]. Such card is prepared and maintained in the ordinary course of the bank's business [R. T. p. 168]. Miss Smith signed the card on April 20, 1966, and the same "bait money" was charged to her on May 5, 1966 [R. T. p. 153]. Verification of the transfer card was made in March of 1966 [R. T. p. 170]. From the time of verification until May 5, 1966, there were no

robberies at the bank [R. T. p. 171].

Warren Anderson of the Los Angeles Police Department testified to the taking of Appellant's fingerprints [R. T. p. 173]. Leroy A. Howe of the Los Angeles Police Department testified to the processing for latent fingerprints of the hold-up note [R. T. pp. 178-179]. John Walker, a Federal Bureau of Investigation expert on fingerprints, testified at length regarding his comparison of Appellant's fingerprints with those on the hold-up note. There were no identifiable fingerprints on the note other than those of Appellant [R. T. p. 208].

The Government and Appellant stipulated that the Crocker-Citizens National Bank is a member of the Federal Reserve System and is insured by the Federal Deposit Insurance Corporation [R. T. pp. 210-211].

Appellant took the stand in his own behalf. He admitted writing the hold-up note [R. T. p. 232], and he admitted committing the robbery [R. T. p. 226]. He admitted prior felony convictions for armed robbery, possession of narcotics, and interstate transportation of forged securities. According to Appellant, however, he and Miss Smith smiled at each other and both of his hands were visible to her [R. T. p. 228].

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENY- ING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

Sergeant Victor Zilinsky testified that Appellant, pretending to be one John Washington [R. T. p. 22], invited the police officers onto the premises and consented to their search [R. T. pp. 22-23]. Until the police learned of Appellant's true identity and then placed him under arrest, Appellant was not subject to any restraint [R. T. p. 26]. The pre-arrest search, during which the police discovered the "bait money" (Exhibit 3), lasted approximately thirty minutes [R. T. pp. 25, 45, 54-55]. Appellant admitted letting the police onto the premises [R. T. pp. 63-65], but denied consenting to any search [R. T. p. 51].

The Court below was thus presented with conflicting evidence regarding the question of consent to search. Unless "clearly erroneous", this Court will not reverse a determination by the trial Court that consent to search was given. Menefield v. United States, 355 F.2d 662 (9th Cir. 1966); United States v. Page, 302 F.2d 81 (9th Cir. 1962). Here, the trial Court was certainly justified in disbelieving Appellant's denial of consent; especially in light of the fact he admitted to three prior felony convictions [R. T. p. 72].

In United States v. Page, supra at page 84, this Court commented:

"It is still true, however, that it is the trial judge who hears the witnesses and who must pass upon their credibility. We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had we seen and heard the witness. It ought not to be assumed that United States District Court Judges are any less determined to preserve constitutional rights than we are. They, too, are sworn to uphold the Constitution."

If, however, this Court should determine that Appellant did not consent to the search, it is submitted that the search was nevertheless valid and that, therefore, the trial Court did not err in denying Appellant's motion to suppress.

Sergeant Zilinsky went to the Home TV Service and Repair shop knowing that there was an outstanding warrant for Appellant's arrest [R. T. pp. 14, 34]. Appellant, knowing that the police were probably looking for him [R. T. p. 65], pretended to be someone else [R. T. pp. 18, 22]. When the police first gained entry to the Home TV Service and Repair shop they did not believe Appellant to be Harold Lincoln Ward [R. T. p. 33]. However, as soon as the police ascertained Appellant's true identity, they placed him under arrest [R. T. pp. 46-47]. Had not Appellant initially pretended to be John Washington, the police would have arrested him immediately

and the subsequent search would have been proper as incident to a valid arrest. United States v. Rabinowitz, 339 U.S. 56 (1950). Appellant should not now be permitted to profit from his deception of the police officers and from his attempt to obstruct them in the performance of their lawful duty.

Where, as here, the police have adequate independent grounds to arrest a suspect, the fact that the search precedes the actual arrest does not necessarily render such search invalid. Cipres v. United States, 343 F.2d 95 (9th Cir. 1965); Holt v. Simpson, 340 F.2d 853 (7th Cir. 1965). Such is certainly the law in California. People of State of California v. Hurst, 325 F.2d 891 (9th Cir. 1963), reversed on other grounds 381 U.S. 760 (1965); People v. Cockrell, 63 Cal.2d 659, 47 Cal. Rptr. 788, 408 P.2d 116 (1965); Wilson v. Superior Court, 46 Cal.2d 291, 294 P.2d 361 (1956). Since Appellant was himself responsible for the search preceding the arrest, he should not now be heard to complain of any impropriety.

The cases cited by Appellant do not require this Court to hold the search unlawful. In United States v. Rutheiser, 203 F. Supp. 891 (S.D. N.Y. 1962), the search preceded formal arrest by some three and one-half hours because of misconduct on the part of the officers. Here, the search preceded arrest by only thirty minutes because of Appellant's own misconduct. In People v. Schaumlöffel, 53 Cal.2d 96, 346 P.2d 393 (1959), the police conducted a general and exploratory search resulting in the seizure of confidential records unconnected with the offense for which

defendant was arrested. Here, the police officers could reasonably conclude that the "bait money" which they seized was the fruit of Appellant's illegal activity.

II

THERE WAS NO UNNECESSARY DELAY IN BRINGING APPELLANT BEFORE THE NEAR- EST AVAILABLE COMMISSIONER.

Appellant concedes, as indeed he must, that Rule 5 of the Federal Rules of Criminal Procedure does not apply to an accused held in State custody. Lovelace v. United States, 357 F.2d 306 (5th Cir. 1966); Young v. United States, 344 F.2d 1006 (8th Cir. 1965), cert. denied 382 U.S. 867 (1965); Swift v. United States, 314 F.2d 860 (10th Cir. 1963); Watts v. United States, 273 F.2d 10 (9th Cir. 1960), cert. denied 362 U.S. 982 (1960); Carpenter v. United States, 264 F.2d 565 (4th Cir. 1959). An exception to this general proposition is recognized when there is collusion between the Federal and State authorities. Anderson v. United States, 318 U.S. 350 (1943). However, there must be more than mere suspicion of such collusion. Young v. United States, supra. Here, there cannot even be the slightest suspicion of any collusion between Federal and State authorities.

Appellant was arrested by Los Angeles Police Department officers on State charges unrelated to the Federal offense involved here [R. T. pp. 46-47]. The police officers did not even learn of the bank robbery and of Appellant's probable participation in it

until after the arrest when they had taken him to the Police Administration Building for booking [R. T. pp. 28-30]. Appellant has cited no authority requiring Federal officers to discontinue their own investigation while an accused is in State custody.

Nor was Appellant misled by the United States Commissioner. In a letter dated June 2, 1966, the Commissioner explained to Appellant that a Federal detainer had been filed against him, that bond was recommenced at \$25,000, but that there would be no proceedings, that is, a preliminary hearing, on this Federal matter until the State charges had been disposed of [T. R. p. 10]. However, on June 8, 1966, the Federal Grand Jury returned the indictment on which Appellant was tried and convicted [T. R. p. 2]. Return of this indictment, a different matter from the Federal detainer, obviated the necessity for any preliminary hearing. United States v. Smith, 357 F.2d 318 (6th Cir. 1966); Crump v. Anderson, 352 F.2d 649 (D. C. Cir. 1965); Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964), cert. denied 377 U.S. 970 (1964).

Bond was set in the State matter, but Appellant was unable to make it because of the additional bond required on the Federal detainer [R. T. pp. 58-59; T. R. p. 10]. Whether or not Appellant was brought before a State magistrate was not raised below and is, therefore, not reviewable here. United States v. Miller, 353 F.2d 724 (2nd Cir. 1965); Williams v. United States, 308 F.2d 652 (D. C. Cir. 1962), cert. denied 372 U.S. 970 (1963). For the foregoing reasons, the trial Court did not err in denying Appellant's motion to dismiss.

III

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPHS, THE TRANSFER LEDGER, THE "BAIT MONEY", OR THE HOLD-UP NOTE.

The adequacy of the foundation for the reception of evidence is a matter which rests largely in the discretion of the trial Court. Moyer v. United States, 312 F.2d 302 (9th Cir. 1963); Brandow v. United States, 268 F.2d 559 (9th Cir. 1959); Arena v. United States, 226 F.2d 227 (9th Cir. 1955), cert. denied 350 U.S. 954 (1956). Regarding none of the items about which Appellant complains was the trial Court's ruling clearly an abuse of discretion.

Susan Smith testified that the photographs, Exhibit 2, accurately represented the situation at the bank at the time of the robbery [R. T. pp. 119-120]. Although Miss Smith saw Appellant's back as he was leaving the bank, she did not keep her eye on him during every instant of his departure [R. T. pp. 135-136]. However, a witness called to qualify a photograph need not even have been present when it was taken; he need only be able to state that the photograph fairly and correctly represents the object depicted. Kleveland v. United States, 345 F.2d 134 (2nd Cir. 1965). Whether the witness' testimony adequately qualifies the photograph is a matter which should be left to the trial Court. Wigmore, Evidence (3rd ed.) §794 at p. 187. It is submitted that Miss Smith's momentary distraction does not render her qualification of the photographs insufficient.

Gerald A. Blum testified that the transfer ledger was prepared when the "bait money" was first transferred to a teller's window [R. T. p. 169]; that when a new teller takes over the window he checks the "bait money" and signs the ledger [R. T. p. 154]; that Susan Smith signed the ledger on April 20, 1966 [R. T. p. 153]; that there was a verification of the "bait money" in March of 1966 [R. T. p. 170]; that there were no robberies of that particular teller's window between the time of verification and May 5, 1966 [R. T. p. 170]; and that the transfer ledger was a regular record kept in the ordinary course of the bank's business [R. T. p. 168]. Clearly, the transfer ledger, Exhibit 9, was admitted into evidence upon a proper and adequate foundation. Helms v. United States, 310 F.2d 236 (5th Cir. 1962).

The fact that neither Mr. Blum nor Miss Smith had personal knowledge of the serial numbers of the "bait money" does not effect the admissibility into evidence of that money. It is just because of this situation that the transfer ledger was produced.

Susan Smith identified Exhibit 1 as the hold-up note which Appellant handed to her [R. T. pp. 114-115]. She left the note on the counter [R. T. p. 138] and precautions were taken to preserve fingerprints [R. T. p. 136]. The fact that the note was momentarily out of her sight does not effect its admissibility. West v. United States, 359 F.2d 50 (8th Cir. 1966); Brewer v. United States, 353 F.2d 260 (8th Cir. 1966); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960).

IV

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY MIGHT CONCLUDE THAT APPELLANT THROUGH FORCE AND VIOLENCE AND INTIMIDATION TOOK THE MONEY BELONGING TO THE CROCKER CITIZENS NATIONAL BANK.

Susan Smith testified that Appellant did not smile at her nor did he say anything about a bag [R. T. p. 132]. She never saw the hand beneath the hat [R. T. p. 134]. As he was leaving the bank, Appellant told Miss Smith to "Be Careful" or "Be quiet" [R. T. p. 118]. She was scared [R. T. p. 117].

Appellant, testifying in his own behalf, admitted writing the hold-up note [R. T. p. 232] and admitted committing the robbery [R. T. p. 226]. He admitted prior felony convictions for armed robbery, possession of narcotics, and interstate transportation of forged securities. According to Appellant, however, he and Miss Smith smiled at each other [R. T. p. 228].

The testimony of Susan Smith, if believed, sufficiently establishes that Appellant through force and violence and intimidation took the money belonging to the Crocker Citizens National Bank. Indeed, the offense is sufficiently established by the hold-up note itself: "Keep quiet and you won't get hurt." United States v. Baker, 129 F. Supp. 684 (S. D. Calif. 1955). Appellant's attack on the sufficiency of the evidence goes largely to the credibility of Susan Smith as against that of Appellant. Under the circumstances of this case, the jury was fully justified in believing Miss Smith

rather than Appellant. It is elementary that a Court of Appeals should not usurp the function of the trier of fact who has had an opportunity to hear the witnesses and judge their demeanor. Hiram v. United States, 354 F.2d 4 (9th Cir. 1965); Davis v. United States, 327 F.2d 301 (9th Cir. 1964); Lyda v. United States, 321 F.2d 788 (9th Cir. 1963).

CONCLUSION

In conclusion, the Government respectfully submits that Appellant's conviction should be affirmed.

Respectfully submitted:

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Byron B. Kohn

BYRON B. KOHN

NO. 21576

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGINO BARBA-REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

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1

NO. 21576

IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

The one-count indictment alleged that appellant, with intent to defraud

the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 90 pounds of marihuana, knowing that it had been imported and brought into the United States contrary to law [C. T. ^{1/}2].

Jury trial of appellant commenced on May 3, 1966, before United States District Judge James M. Carter [R.T. ^{2/}2]. Appellant was found guilty as charged on May 4, 1966, and was sentenced upon the same date to the custody of the Attorney General for five years [R.T. 125, 129-30; C. T. 4].

The notice of appeal was not included as part of the record herein.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. The Trial Court erred in admitting into evidence testimony regarding marijuana found in the car appellant was driving, since the obtaining of the evidence was in violation of appellant's rights under the Fourth Amendment of the United States Constitution (Tr. p. 16).

"2. There was insufficient evidence at the trial to prove beyond a reasonable doubt that the appellant was guilty of the offense charged.

"3. The Trial Court erred in its conduct before the jury by assuming the role of prosecutor (Tr. pp. 72-75)." (Brief of Appellant, p. 3).

^{1/}
"C.T." refers to the Clerk's Transcript.

^{2/}
"R.T." refers to the Reporter's Transcript of Proceedings.

STATEMENT OF THE FACTS

On March 2, 1966, a 1955 Buick automobile arrived at the United States Border Patrol traffic checkpoint 18 miles north of Oceanside, California. The checkpoint involved northbound traffic on Highway 101, a main traffic artery between San Diego and Los Angeles [R.T. 14-15, 23] .

Appellant was the driver and sole occupant of the Buick, which was headed in a northerly direction [R.T. 15]. The vehicle was stopped by an officer at the checkpoint. Appellant drove off the roadway as directed, and Immigration and Patrol Inspector Richard E. Dick (who also was an acting Customs Officer) approached and identified himself [R.T. 13-14, 16] .

Appellant opened the trunk of the vehicle as directed by Inspector Dick, who detected an odor after the trunk was opened. He did not immediately realize the nature of the odor, although he "had an idea but wasn't certain" [R. T. 19]. As a result, he suspected that there might be packages under the rear seat, and he lifted the rear seat and found some packages and was then "quite sure I knew what it was" [R.T. 18-19] .

It was stipulated that the packages weighed approximately 90 pounds and that a qualified chemist examined the packages and discovered that they contained marihuana [R.T. 30-31] . There was testimony as well as a stipulation in regard to the "chain of custody" of the packages [R.T. 16, 21-23, 30-31] . The checkpoint was in San Diego County [R.T. 17].

The marihuana had a selling price of from \$1435 to \$1640 in Tijuana,

3/

Mexico, and an ultimate estimated street value of \$90,000.

The packages were not visible when the seat was in position [R.T.19-20]. Inspector Dick noticed the odor when he opened the rear door after previously noticing the odor when the trunk was opened. The marihuana odor in the vehicle was also evident to Supervisory Customs Port Investigator George R. Gore, who drove the Buick to Los Angeles with the packages still underneath the seat [R.T. 19, 21-24, 27-28]. Appellant testified that he was accidentally locked out of the Buick during the trip to the checkpoint and had to hammer through a window in order to get inside again [R.T. 33-34]. The odor of marihuana increases as the temperature increases [R.T. 74-75].

Appellant made a number of statements to various officers and eventually confessed that he knew that there was marihuana or some type of drugs or narcotics in the car [R.T. 53, 61, 64].

Appellant employed the "missing man" defense. The "missing man" was said to be "Antonio Rodriguez." Appellant testified that he had known "Rodriguez" in the past in Tijuana, was acquainted with "Rodriguez"'s cousin, Jesus, and accidentally met "Rodriguez" again at the information booth at the Plaza in San Diego on Tuesday. He also testified that "Rodriguez" would

3/

The Tijuana value was estimated at between \$35 and \$40 per kilo [R.T. 56]. With 2.2 pounds per kilo, 90 pounds would amount to approximately 41 kilos. The \$90,000 figure is based upon an estimate of \$1,000 per pound, which is based upon a total of 1,000 cigarettes per pound, selling at \$1 per cigarette [R.T. 57].

stay at a cousin's home when he went to Tijuana [R.T. 34, 40-41, 43].

Investigator Gore testified that appellant had previously stated that the meeting in question between appellant and "Rodriguez" occurred on a bus [R.T. 53].^{4/}

Appellant testified that "Rodriguez" was of medium height and weighed around 150 or 160 pounds, although appellant was not certain of the weight [R.T. 37]. Two officers testified that appellant had stated to them in separate interviews that "Rodriguez" was approximately six feet tall and weighed approximately 200 pounds [R.T. 53, 56, 61, 63]. Appellant denied having made the statement concerning 200 pounds [R.T. 42].

Appellant also testified that "Rodriguez" told him that his car was out of order, that he had to buy another car for transportation, and that he gave appellant \$30 as well as an offer to obtain work for him in return for appellant's act of driving the second car from San Diego to Los Angeles, about 125 miles [R.T. 34, 38-39]. Two officers from different agencies testified that appellant stated during separate interviews that "Rodriguez" promised to pay \$50 for the trip, of which \$30 was to be paid in advance [R.T. 53-54, 61-62]. Appellant denied having made this statement [R.T. 38].

Appellant testified that he separated from "Rodriguez" after the Tuesday encounter and took the bus to Tijuana after agreeing to meet on the following day, when appellant would tell "Rodriguez" whether he would take the car. He also testified that he met "Rodriguez" on the following day at Twelfth and

^{4/}

Appellant referred to the Tuesday before the arrest, and Gore referred to March 1. The latter date, March 1, 1966, was the Tuesday before the arrest of appellant on March 2.

Market, which was about 15 blocks from the Plaza [R.T. 44-47]. Investigator Gore testified that appellant had stated that he met "Rodriguez" at the Plaza on that date (March 2) and that they walked about four blocks to the Buick [R.T. 54].

Appellant testified that "Rodriguez" told him to deliver the vehicle near a large guilding on the right side of Bixel Street in Los Angeles after following the specified route [R.T. 36, 48]. Two officers testified that appellant had stated that the large building was on the left side of the street [R.T. 55, 63].

Appellant testified that "Rodriguez" gave him a diagram showing directions; that he, appellant, had the diagram with a map on the seat of the Buick during the trip, and that he did not remember what had happened to the diagram [R.T. 47-48]. Inspector Dick testified that he made an additional search of the vehicle after finding the packages and found no diagram [R.T. 69].

Appellant impliedly conceded that he told Inspector Dick that his address was in Chula Vista, California. Appellant actually lived in Tijuana and Mexicali. He testified that the Chula Vista address was his mother's address and his own mailing address [R.T. 49-50].

Appellant admitted that he had had two felony convictions. He testified that he did not observe a strange odor in the vehicle [R.T. 50].

V

ARGUMENT

A. ADMISSION OF EVIDENCE OBTAINED BY SEARCH OF A VEHICLE DID NOT CONSTITUTE "PLAIN ERROR."

Although there was no objection in the trial Court to the admission of

evidence obtained by search of the Buick and there was no adversary hearing in the trial Court to present evidence upon which the trial Court or this appellate Court could make a ruling upon the matter, appellant now contends, for the first time, that the trial Court erred in admitting the evidence without objection.

By the time that the evidence was offered, appellant had already waived any Fourth Amendment objection by failing to make the motion to suppress after indictment, there being no extenuating circumstances.

Sandez v. United States, 239 F.2d 239, 242 (9th Cir. 1956), citing Segurola v. United States, 275 U. S. 106 (1927).

Appellant's position is somewhat less secure than that of the unsuccessful litigants in Segurola, for he not only failed to raise the issue prior to trial as required by Rule 41(e) of the Federal Rules of Criminal Procedure, but he also failed to make the motion during trial. (The trial Court has discretion to hear the belated motion under Rule 41, but appellant asks this Court to rule upon the merits, in the absence of a hearing, where the trial Court has not yet had the opportunity to rule upon the preliminary question, which is whether the belated motion should be entertained if it is ever filed.)

The basic difficulty in appellant's position is the fact that an appellate Court cannot be satisfied that all of the evidence is before it when there was no need to present evidence at trial because the question was not before the trial Court.

It is too late to raise a search and seizure question, for the first time, on appeal.

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948).

It has been suggested that there might be an exception to this rule in cases of "plain error affecting substantial rights" under Rule 52(b), Federal Rules of Criminal Procedure.

Ramirez v. United States, 294 F.2d 277, 282 (9th Cir. 1961).

5/

However, in Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961),

this Court held that introduction of unlawfully-seized evidence would not constitute plain error under Rule 52(b) because the admission of the evidence does not affect the "'fairness, integrity, or public reputation' of the proceedings below." The opinion noted that the purpose of the exclusionary rule is to discourage overzealous law enforcement officers. The Court added that the "failure to proceed in accordance with Rule 41(e) prevents this court from now considering this claimed error." (at p. 629).

Appellant places considerable emphasis upon his conclusion that "there was no testimony that officer Dick was familiar with such [marihuana] odors."

(Brief of Appellant, p. 8).

This statement provides an excellent example of the defects in the suggested rule that would permit litigation of questions upon appeal when the evidence has not been heard in the trial court, for the records of this Court show that Inspector Dick had previously discovered a huge load, consisting of 204 pounds of marihuana, on March 10, 1964.

Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

Had his opinion of the nature of the odor been one of the issues in the trial

5/

Cited in Sanchez v. United States, 311 F.2d 327, n.5 at p.330 (9th Cir.

1962).

Court, evidence may well have been available. While he testified that he "had an idea but wasn't certain" [R.T. 19], he was not asked concerning the strength of his opinion. This was not in issue.

While it was suggested in Bouchard v. United States, 344 F.2d 872, 875 (9th Cir. 1965), that failure to object in the trial court does not preclude consideration of the Fourth Amendment question upon appeal where "good cause" is shown for the failure to object, it is apparent that a claim of incompetent counsel is based solely upon the fact that counsel failed to move to suppress evidence, there is no showing of "good cause," unless all defendants are to be permitted to raise innumerable new issues upon appeal by merely claiming incompetency of trial counsel.

Although there is good authority in support of the proposition that "ineffective assistance of counsel is not likely to be tolerated as a backdoor for arguing

6/ Of course, probable cause would not require absolute certainty. There is good reason to believe that Inspector Dick had probable cause to believe that contraband was concealed when he "had an idea" concerning the source of the odor and suspected that there might be packages under the rear seat [R.T. 18-19]. At any rate, the case is not sufficiently clear to fall within the confines of "plain error," which must be "'clearly or plainly apparent'" and "can be [seen at the first glance without search or study."

Percifield v. United States, 241 F.2d 225, 228 (9th Cir. 1957).

^{7/}
search and seizure claims, appellant seeks to belatedly raise the search and seizure issue by claiming incompetency of counsel.

He asserts that the "Failure of appointed counsel to research and be familiar with rules of evidence relating to search and seizure" was fundamentally unfair.

(Brief of Appellant, p. 5).

However, there is no evidence that appellant's counsel failed to engage in research or failed to become familiar with the rules. He may have decided that the seizure was lawful, that a motion to suppress would be unmeritorious and time-consuming, and that it would be tactically advantageous to refrain from making the motion. His thought processes and tactical decisions are not included in the record upon appeal, since the question of competency of counsel has not been the subject of an evidentiary hearing in the trial Court (e.g., by possible motion under 28 U.S.C.A. 2255).

It is possible that appellant's counsel read 8 U.S.C.A. 1357, which authorizes searches, by Immigration officers without warrants, of any vehicle within a reasonable distance from any external boundary of the United States. He may have noted that the statute contains no requirement of reasonable cause or probable cause for the search and also that there is a "strong presumption of constitutionality due to an Act of Congress" ^{8/} He may have considered the opinion in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957), in

Thornton v. United States, 368 F.2d 822, 827, n. 9 (C.A.D.C. 1966)

United States v. Di Re, 332 U.S. 581, 585 (1948).

which the Court of Appeals unanimously held that immigration officers may stop and search vehicles and that "Such a procedure might reasonably involve examination of any personal property in their possession as well as all parts of the car including the trunk." While it is true that this language was considered to be dictum in this Court's opinion in Contreras v. United States, 291 F.2d 63, 66 (9th Cir. 1961), the question is not whether the search was lawful but whether appellant's counsel was incompetent. If he had read Haerr and was not aware of the analysis of Haerr in Contreras, would he thereby become incompetent? If so, there would be few competent attorneys.

Appellant's counsel may have considered other decisions upholding the authority of immigration officers to search vehicles, portions of vehicles, or other personal property.

Kelly v. United States, 197 F.2d 162 (5th Cir. 1952) (vehicle);

Renteria-Medina v. United States, 346 F.2d 853 (9th Cir. 1965) (notebook);

People v. Jennings, 231 Cal. App. 2d 744 (1965) (vehicle trunk).

In view of these decisions, it is respectfully submitted that appellant is incorrect when he states that the matter was handled "cavalierly" by his counsel and that he "reduced the trial to a farce or sham" (Brief of appellant, pp. 5-6).

Appellant cites Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

Brubaker does not involve a Fourth Amendment question. It involves a habeas corpus proceeding, thus permitting a hearing upon the question of competency of counsel, allowing a proper presentation of the facts to the appellate court.

In Brubaker, this Court stated (at p. 37):

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"

It is respectfully submitted that this test was met herein and that appellant has not satisfied the burden of showing that his counsel was "'so incompetent or inefficient as to make the trial a farce or a mockery of justice.'"

Bouchard v. United States, supra, 344 F.2d 872, 874, quoting from Reid v. United States, 334 F.2d 915 (9th Cir. 1964) (Emphasis added).

Appellant has not shown that the trial was a "'mockery of justice, shocking to the conscience of the court.'"

Dodd v. United States, 321 F.2d 240, 243 (9th Cir. 1963), quoting from Washington v. United States, 297 F.2d 342 (9th Cir. 1961).

"An accused cannot bring about a judicial evaluation of the quality of a defense; he is entitled only to allege and show that the proceeding was not a fair trial."

Mitchell v. United States, 259 F.2d 787, 794 (C.A.D.C. 1958).

Appellant has not satisfied this burden.

Appellant also cites People v. Ibarra, 60 C. 2d 460 (1963), in which counsel demonstrated that he was unfamiliar with a rule that "should be a commonplace to any attorney engaged in criminal trials." (at p. 465). A highly-sophisticated argument regarding the extent of permissible immigration

earches, or the sufficiency of the evidence to demonstrate probable cause to believe that contraband is being concealed, or the question whether consent to search was an "informed" consent (Brief of Appellant, p. 7), can hardly be described as a matter of "commonplaces."

Furthermore, this Court is not required to follow the state court decision in Ibarra, and it is respectfully submitted that it is not desirable to brand defense counsel with incompetency whenever they fail to navigate the "quagmire of 'searches and seizures'" ^{9/} in the exact fashion that subsequent appellate counsel would require, particularly where there is no evidence concerning the reasoning behind the decisions of trial counsel.

Appellant's assertion that his counsel was incompetent is similar to the unsuccessful Fourth Amendment claims of appellants in other Federal cases.

Sheridan v. United States, 264 F.2d 236, 237 (5th Cir. 1959), cert. denied, 359 U.S. 997 (1959);

Kapsalis v. United States, 345 F.2d 392, 394 (7th Cir. 1965), cert. denied, 382 U.S. 946 (1965);

Way v. United States, 276 F.2d 912, 913 (10th Cir. 1960).

Here, as in Way (at p. 913), defense counsel "may have had adequate reason for failing to raise these points." (The points included a Fourth Amendment claim).

It should be noted that in this case, as in Bouchard, supra, at p. 875,

^{9/}
The language is from Davis v. United States, 327 F.2d 301, 302 (9th Cir. 1964).

the trial Judge commended appellant's counsel at the conclusion of the trial.

Judge Carter stated:

"I want to compliment Mr. McCarty for his defense in this matter. I think he did a very good job with what he had to work with." [R.T. 128].

There is a presumption of competency of counsel.

Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).

In conclusion, it is respectfully submitted that appellant has not rebutted the presumption of competency of counsel; that there has been no demonstration that the search in question was unlawful; that the trial was not "a farce or a mockery of justice" and was not "shocking to the conscience of the court"; that this was not a case of "plain error," which must be "'clearly or plainly apparent'"; and that the decisions in Billeci, Sheridan, Kapsalis, and Way, supra, are controlling in this case.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION

Appellant contends that the evidence was insufficient to sustain the conviction, although the evidence is much stronger than the evidence in Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966), a similar case involving a huge load of marihuana and the "missing man" defense. The conviction in Aguilar was affirmed. This Court noted (at p. 381) that "This is not a de minimis quantity case where incidence of error in finding knowledge would be high."

In the instant case, appellant's second version of the events, related

at trial, was only slightly less incredible than his first, chiefly because he scaled down the amount of the alleged offer to drive the old car about 125 miles, reducing the figure from an absurd \$50 to a remarkable \$30 for what must be slightly over two hours' work.

Although appellant supposedly believed that the transaction was innocent, he admitted to the officers that the missing man told him to park the car "after dark but before dawn. . . ." [R.T. 63], and he testified that he broke a window of the vehicle with a hammer during the trip [R.T. 33-34], which not only indicates that all of the windows were closed but also demonstrates remarkable behavior by an allegedly innocent man, who would normally refer to a locksmith or repairman under these circumstances, unless he feared that the strong odor of marihuana would be detected.

Appellant claimed that the missing man needed to buy the vehicle in question because his other car was out of order, and yet the missing man was going to transport the disabled vehicle to Los Angeles and arrive there before appellant did so [R.T. 34-36] .

Furthermore, in view of the fact that appellant confessed to one officer and admitted that he knew that there was marihuana or some type of drugs or narcotics in the car [R.T. 64], it is not necessary to discuss at length some of the other major weaknesses in his defense, including the strong odor of marihuana in the vehicle; the failure of appellant to produce a single witness who knew that the missing "Rodriguez" actually existed, although appellant supposedly was acquainted with Jesus, the cousin of "Rodriguez" [R.T. 40]; the general lack of credibility in the testimony of appellant, who had two

felony convictions [R.T. 50]; the disappearance of the alleged diagram [R.T. 47-48, 59, 69]; and the numerous major inconsistencies in appellant's two versions of the events.

The latter inconsistencies included the statement that appellant was promised \$50 and the later testimony that he was promised \$30 [R.T. 38, 54, 62]; the statement that he met "Rodriguez" on the bus on the first day, and the testimony that the meeting was at the information booth at the Plaza [R.T. 43, 53]; the statement that he met "Rodriguez" at the Plaza on the second occasion, and the testimony that the meeting was about 15 blocks from the Plaza [R.T. 46-47, 54]; the statement that "Rodriguez" was approximately six feet tall and weighed approximately 200 pounds, and the testimony that "Rodriguez" was of medium height and weighed about 150 or 160 pounds [R.T. 57, 56, 63]; the inconsistency in the description of the location of the place of delivery on Bixel Street [R.T. 36, 55, 63]; and the false address apparently given to Inspector Dick [R.T. 49-50].

Appellant complains that the officers did not attempt to make a delivery of the marihuana to "Rodriguez." However, appellant had admitted that he had committed an escape in the past [R.T. 68], so it would have been foolish for the officers to provide an opportunity for another escape with an automobile.

C. THE CLAIM THAT THE TRIAL COURT ASSUMED THE ROLE OF PROSECUTOR CANNOT BE RAISED IN THIS APPEAL.

Appellant asserts that the trial Judge committed error "by assuming the role of prosecutor" during the trial. Since no objection was made in the trial

Court, appellant is precluded from raising the new issue in this appeal. Issues must be raised in a timely fashion in the trial Court.

Ramirez v. United States, supra, 294 F.2d 277, 283;

Stein v. United States, supra, 166 F.2d 851, 855.

While there may be an exception to this rule in cases of "plain error," it is respectfully submitted that this is not a case of "plain error."

D. ASSUMING ARGUENDO THAT APPELLANT MAY NOW RAISE THE NEW ISSUE OF THE CONDUCT OF THE COURT, NO ERROR WAS COMMITTED IN THIS REGARD.

Assuming arguendo that appellant may now raise the new issue concerning the conduct of the trial Court, it is respectfully submitted that the comments of the trial Judge were neither erroneous nor prejudicial to the defense.

While the trial Court indicated that additional evidence should be presented upon the question of the possible existence of marihuana odor, this suggestion did not constitute error. "It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help or hurt one side or the other." (Emphasis added) .

Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941).

The suggested testimony may have helped to avoid a jury inference harmful to appellant, because the witness testified, in response to a question by the trial Judge, that the strength of the odor of marihuana rises as the temperature rises [R.T. 75]. The trial commenced on May 3, normally a warm day. The jurors noticed the odor of the marihuana in the courtroom on a day in May, they may have considered the probability that the defendant noticed the odor on March 2 (normally a much cooler day). This would have been damaging to appellant's case, had not the information elicited the unfair effect of jury ignorance concerning the temperature effects.

Appellant quotes United States v. Carengella, 198 F.2d 3, 8 (7th Cir. 1952). The complete quotation from Carengella states in part that "It is of course the duty of the trial judge to conduct the trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties" (Emphasis added). The conviction of Carengella was affirmed.

Appellant's claim that the testimony was "highly damaging to appellant" (Brief of Appellant, p. 11) is quite difficult to reconcile with his claim that the evidence was insufficient.

However, in view of appellant's confession, as well as the strong evidence in regard to the odor (already before the jury at the time of the questioning by the trial Court), it is respectfully submitted that any error in this regard would constitute harmless error.

Carengella, supra, at p. 8.

"A defendant is entitled to a fair trial but not a perfect one."

Lutwak v. United States, 344 U.S. 604, 619 (1953).

Appellant refers to a number of examples of an alleged judicial attitude favoring the prosecution. (Brief of Appellant, p. 10). It is difficult to attach much significance to these matters. In fact, the trial Court provided appellant with a very significant potential tactical advantage by allowing him to introduce his hearsay self-serving statement over objection, without requiring that appellant testify and submit to cross-examination [R.T. 25-26].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Phillip W. Johnson
by
Joseph A. Milch

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21,578

LAURENCE DAVIS, *Appellant*,

v.

NORMAN M. LITTELL, *Appellee*.

Appeal from the United States District Court for the
District of Arizona

APPELLANT'S OPENING BRIEF

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21,578

LAURENCE DAVIS, *Appellant*,
v.
NORMAN M. LITTELL, *Appellee*.

**Appeal from the United States District Court for the
District of Arizona**

APPELLANT'S OPENING BRIEF

I. JURISDICTION

Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. § 1332. At the time of filing the original and the amended complaints, plaintiff was a citizen of Arizona and defendant a citizen of Maryland. The amount in controversy exceeded \$10,000. Complaint, par. I (T.R. 1); Amended Complaint, Count I, par. I (T.R. 30); Answer, par. I (T.R. 61). This Court has jurisdiction by virtue of 28 U.S.C. § 1291.

II. STATEMENT OF THE CASE

This is a claim for libel and slander. The defendant, Littell, was general counsel of the Navajo Tribe and plaintiff, Davis, was one of the assistant general counsels. Both are non-Indians. They were employed under a contract approved by the Secretary of the Interior for part-time services, and maintained separate offices off the Navajo Reservation.¹ For reasons of his own Littell wished to have Davis fired.² The latter was well thought of by Tribal officials; therefore it was impossible for Littell simply to ask for his dismissal; instead he carried out a slander campaign, accusing Davis of corrupt connections with various interests asserted to be inimical to the Tribe, and in this way destroyed his support among the Tribal officials and secured his dismissal. Even after the dismissal, Littell's slander campaign continued, with an attempt to poison the press against Davis.³ Davis suffered severe loss of income in consequence, as well as damage to his moral and professional reputation which may not ever be fully ascertained.

This case was decided upon motion for summary judgment. For the first time, in this motion filed some five years after the Complaint, defendant claimed absolute privilege for his slanders, on the ground that he was a

¹ See Request for Admissions of Fact and Genuineness of Documents (Second Set), T.R. 140, and defendant's answer thereto, T.R. 156. A copy of the contract, admitted to be genuine, appears at T.R. 143-155.

² Since there has been no trial, Littell's motives for wanting Davis dismissed have not been disclosed in this record. Subsequent to his slanders of Davis, Littell's general counsel contract with the Navajos was terminated by the Secretary of the Interior for diverting his clients' assets to his own use and other forms of overreaching. It is now obvious that Littell dared not long tolerate as his associate on the Navajo contract an honest and knowledgeable man. See *Udall v. Littell*, 366 F. 2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967). At the time the slanders of Davis were published, however, Littell's true character was not generally known; hence his lies were still capable of doing damage.

³ Amended Complaint, T.R. 30-48.

public official.⁴ The court below granted the motion. T.R. 121, 159.

On February 18, 1963, defendant had filed a counterclaim, accusing plaintiff of libel by publishing the original complaint (T.R. 49). After the District Court granted defendant's motion for summary judgment, plaintiff filed a motion for summary judgment against defendant's counterclaim. This was denied. See minute entries, T.R. 181-182. The current status of the case in the District Court, thus, is that Davis is not only barred from seeking damages for Littell's lies about him, but must defend Littell's \$200,000 claim because he dared bring the instant suit and distribute copies of the complaint in an effort to rehabilitate his reputation with some of the persons to whom Littell had published his slanders.

Final Judgment with a Rule 54(b) determination requiring this piecemeal appeal was entered over plaintiff's objection on October 13, 1966. T.R. 167. Cf. minute entries, October 28, November 10, 1966. T.R. 181.

III. SPECIFICATION OF ERROR

The District Court erred in granting defendant's motion for summary judgment, and in entering final judgment for the defendant, on the ground that defendant was entitled to executive privilege. This was error because the law does not grant immunity from tort liability to contract attorneys for an Indian tribe.

IV. ARGUMENT

Summary

The decision of the court below, that the general counsel of an Indian tribe enjoys absolute privilege, is, we believe, wholly unprecedented. Based on the mechanistic extension of a rule of Federal common law to a field where it

⁴ An earlier motion to dismiss was denied on May 20, 1963. See Minute Entries, T.R. 179.

is inapplicable, it overlooks the compelling policies of State law, Federal statute, and judicial decisions, which demand exactly the opposite conclusion. By leaving defendant free to seek damages from the plaintiff for daring to sue him, it indeed vests this unworthy former attorney for an Indian tribe with a tyrannous power denied every public official in the United States.⁵

1. The Federal law of executive privilege

The doctrine of executive privilege grew out of *Spaulding v. Vilas*, 161 U.S. 483 (1896), where the Postmaster General of the United States was held immune from liability for statements contained in a circular to local postmasters. At first confined to libel cases, it was extended to other torts and to subordinate officials by *Gregoire v. Biddle*, 177 F. 2d 581 (2d Cir. 1949), cert. denied 339 U.S. 949 (1950).⁶ The Supreme Court approved the extension to subordinates in *Barr v. Matteo*, 360 U.S. 564 (1959), and *Howard v. Lyons*, 360 U.S. 593 (1959). The rule is one of Federal common law, available as a defense to private citizens' claims made under State law against Federal officers.⁷

Defendant Littell does not even claim to be a Federal officer, but the officer of an Indian tribe. Hence merely stating the *Vilas-Gregoire-Barr* rule shows its inapplicability to the case at issue.

⁵ Cf. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁶ Cf. *Bershad v. Wood*, 290 F. 2d 714 (9th Cir. 1961), which discusses the law prior to *Gregoire*.

⁷ "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. See *e.g.*, *Slocum v. Mayberry*, 2 Wheat. 1, 10, 12. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty (see, *e.g.*, *Mayor v. Cooper*, 6 Wall. 247; cf. *Tennessee v. Davis*, 100 U.S. 257), or immunity from suit. See *Barr v. Matteo*, *supra*; *Howard v. Lyons*, *supra*." *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

2. State law governs the plaintiff's claim

Nine of Littell's slanders about the plaintiff were published in Arizona and one in the District of Columbia. See Amended Complaint, T.R. 30-43. Although both plaintiff and defendant were retained at the time by the Navajo Indian Tribe, they are both non-Indians. Navajo Tribal law does not even purport to govern the relations of non-Indians with each other;⁸ and it has long been held that such matters are within State jurisdiction. *Langford v. Monteith*, 102 U.S. 145, 147 (1880); *United States v. McBratney*, 104 U.S. 621 (1881); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

Arizona and District of Columbia law, therefore, clearly govern the plaintiff's claims here.

3. No State law extends Executive privilege to a non-Indian contract attorney for an Indian Tribe

We have discovered no statute or judicial decision of either Arizona or the District of Columbia according absolute privilege to the slanders of an attorney for an Indian tribe. The decision of the District Court in this case is therefore a new departure. In the next section of the brief we shall discuss why it is unwise; here we emphasize that it is unsupported by authority.

The trial judge in his order of September 27, 1966 (T.R. 159), cites only one Arizona case, *Long v. Mertz*, 2 Ariz. App. 215, 407 P. 2d 404 (1965). It is a decision of the intermediate appellate court of the State and holds that a public officer of Arizona is absolutely immune from liability for a statement made in the course of his duties. An earlier case in the State Supreme Court, not cited by the trial court here, *Connor v. Timothy*, 43 Ariz. 517, 33 P. 2d 293 (1934), held that a slander published by one school board member to another in an official meeting had

⁸ Navajo Tribal Code, Title 7, § 63. (Tribal courts have civil jurisdiction only where the defendant is an Indian.)

only qualified privilege. Neither case is a precedent for extending privilege to a non-Indian contract attorney for an Indian tribe. To do so is to make new law, which always ought to be done only on the basis of a careful evaluation of the conflicting values and policies involved. We contend that the District Court falsely weighed the values and policies at stake, if indeed it can really be said to have weighed them at all.

4. Absolute immunity from tort liability ought not to be extended to tribal attorneys

Judge Learned Hand justified the rule of absolute immunity for Federal officers by writing:

“... it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” *Gregoire v. Biddle*, 177 F. 2d 579, 581 (1949).

The *Gregoire* case arose in wartime. The plaintiff claimed malicious prosecution and false imprisonment when the Attorney General of the United States and several of his subordinates locked him up on Ellis Island as a German enemy alien, though he was in fact a Frenchman.

Although several State courts have latterly adopted a rule similar to *Barr* and *Howard* to grant State officers absolute immunity from libel claims,⁹ they have not followed the full sweep of *Gregoire* and granted all their officials absolute immunity from tort liability for all acts

⁹ E.g., *Long v. Mertz*, 2 Ariz. App. 215, 407 P. 2d 404 (1965); *Matson v. Margiotti*, 371 Pa. 188, 88 A. 2d 892 (1952).

within the scope of their authority. In fact, they cannot; for the very same acts which would be absolutely privileged under *Gregoire* if done by a Federal officer, may give rise to statutory liability of State officers under the Civil Rights Act of 1871 (42 U.S.C. § 1985).¹⁰ The Federal rule of absolute immunity presumes a very high degree of trustworthiness in Federal officers, one the law does not accord to State officers, much less to contractors with Indian tribes.

To a large extent, the Federal rule of absolute immunity is judicial legislation to enforce the Supremacy Clause.¹¹ This is starkly shown in *Norton v. McShane*, 332 F. 2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965), which was a suit against the Chief U. S. Marshal, the Deputy Attorney General, and others, for false imprisonment at the time of the Oxford, Mississippi, riots. As applied in *Norton*, the immunity rule amounts to the same thing as the "political question" doctrine of *Georgia v. Stanton*, 6 Wall. 50 (1867). It says, in effect, that the courts are not the proper forum for controlling the efforts of the executive to preserve the Nation in time of great public peril.

It is perfectly obvious that the policy underlying *Gregoire*, *Norton*, and similar cases, has nothing to do with the part-time general counsel of an Indian tribe.

Extending the rule of *Spaulding v. Vilas* to the libels of subordinate officers, on the authority of *Gregoire*, was not undertaken without qualms by the Supreme Court. *Barr* and *Howard* were five-to-four decisions, and the five-justice majority could not even agree on a single Opinion of the Court. Two of the majority have since left the bench, and one is about to do so. These are shaky precedents indeed. The Supreme Court has already drawn the line against further extension of absolute immunity. In

¹⁰ Cf. *Norton v. McShane*, 332 F. 2d 855 (5th Cir. 1964).

¹¹ U.S. Const., Article VI, Clause 2.

Dombrowski v. Eastland, No. 118, October Term 1966, decided *per curiam* as recently as May 15 of this year, it has refused to accord immunity to subordinate officials of the legislative branch. Surely if the counsel of a committee of the United States Senate is not entitled to absolute immunity, neither is the counsel of an Indian tribe.

The Courts of Appeals have not been wholly happy with the enshrinement of *Gregoire*. This court had its qualms in *Hughes v. Johnson*, 305 F. 2d 67 (9th Cir. 1962), and *S. & S. Logging Co. v. Baker*, 366 F. 2d 617 (9th Cir. 1966). The Fifth Circuit raised the question of whether the immunity doctrine has not gone too far in *Chaflin v. Pratt*, 358 F. 2d 349, note 9 at page 353 (1966). The First Circuit has plainly refused to follow *Gregoire* in *Kelley v. Dunne*, 344 F. 2d 129 (1965), writing the following wise words (at page 133):

“... since the doctrine of absolute immunity is based upon the relative importance of the public, as against a private, interest, application of the doctrine must vary with the relative weight of the competing interests. In the cases in which private rights have been foreclosed, free exercise of the public function has been considered highly important.”

All reason militates against the mechanistic extension of absolute immunity to the non-Indian contract counsel for an Indian tribe, especially in the instant case. There is here no war or national emergency, no question of Federal supremacy, not even any possibility of interference with any interest of the Navajo Tribe, since defendant Littell has already been removed, for misconduct, as its counsel. And the degree of trustworthiness presupposed in the carefully selected Federal officer is wholly lacking in the contract attorney.

Indeed, Littell never was a public official, even of the Navajo Tribe, at any time material hereto. The analogy between the attorney general of a State and a part-time

attorney having the duties described in his contract (T.R. 143-155) is too facile.¹² On this point there is a direct precedent. *Adams v. Murphy*, 165 Fed. 304 (8th Cir. 1908), squarely holds that the general counsel of an Indian tribe is not a public officer.¹³ In regard to Littell himself, the D.C. Circuit has aptly stated:

“In general, and for present purposes, Appellee’s relationship to the Tribe was not unlike that of a private practitioner representing a business enterprise having a variety of recurring legal problems the scope

¹² The sections of the Navajo Tribal Code, Title 2, §§ 821-823, dealing with the duties of the general counsel, are merely descriptive, having been adopted subsequently to execution of the contract. Since the contract and every amendment of it required approval by the Secretary of the Interior (25 U.S.C. § 81), the Tribe was in fact unable to prescribe Littell’s duties by law. Such was Littell’s own position in prior litigation before this court. In *Littell v. Nakai*, 344 F. 2d 486 (9th Cir. 1965), he sued the Chairman of the Tribal Council, a true public official of the Tribe, for tortious interference with the contract, which he claimed was governed solely by the laws of the United States. This court recognized that Littell’s rights originated in the laws of the United States (at page 488), but held the interpretation of the contract to be within exclusive tribal jurisdiction.

¹³ The usual tests for “public office” are the following:

Creation by constitutional or statutory provision. 67 C.J.S. 113, Officers, § 5(b) (4).

Incumbent not engaged by contract. *Id.* § 6, p. 117.

Position involves a delegation of some part of sovereign power. *Tomaris v. State*, 71 Ariz. 147, 224 P. 2d 209 (1950); 67 C.J.S., Officers, § 5(b) (2), p. 110; *Martin v. Smith*, 1 N.W. 2d 163, 140 A.L.R. 1076 (Wis. 1941).

Incumbent must take oath of office. 67 C.J.S., Officers, § 5(b) (5), p. 114, 140 A.L.R. 1092, cf. *Arizona Revised Statutes*, § 38-231.

Full time rather than intermittent duties, excluding other employment. 140 A.L.R. 1087.

Citizenship in the sovereignty creating the office. 67 C.J.S., Officers, § 13, p. 127, cf. *A.R.S.* § 38-201.

Express designation by law of the position as a public office. See *Navajo Tribal Code*, Title 2, § 822:

“An attorney and associate attorneys shall be employed to act as General Counsel for the Navajo Tribe.”

And compare, § 881:

“There is created the office of the Executive Secretary of the Tribe.”

[Emphasis supplied]

of which is reasonably well established and sufficiently predictable to relate to a fixed retainer fee.” *Udall v. Littell*, 366 F. 2d 668, 670 (1966).

It is a non sequitur to state that because the Navajo Tribe is a public body and Littell performed duties for it under contract, therefore he is entitled to absolute immunity for tort liability within the scope of those duties. By such reasoning, the general counsel of a public power district would have absolute immunity; although the general counsel of a privately-owned electric utility, whose actual duties are almost identical, would not. By such reasoning, every contractor building a road for the State Highway Department would be free to run over members of the public with his bulldozers.

It is true that Littell actually did perform work for the Navajo Tribe beyond that prescribed by his contract. Defense counsel, in the motion for summary judgment, referred to him as “the chief non-Indian adviser to the Tribe on matters of policy as well as of law.” (T.R. 122). But he achieved this position not by public office, nor by contract, but by usurpation.

This court is well aware of some of the defendant’s efforts to retain his usurped power over the Navajos, after they had elected a new chairman on the platform of “Littell must go,” and even after the Secretary of the Interior terminated his contract for overreaching.¹⁴ The element of trustworthiness presupposed of Federal, and to a lesser extent of State, officers is wholly lacking.

It is bad law and worse morality to give such a usurper, as the court below does, absolute immunity to the tort claims of his victims, as if he were a public officer. As

¹⁴ See *Littell v. Nakai*, 344 F. 2d 486 (9th Cir. 1965); *Udall v. Littell*, 338 F. 2d 537 (D.C. Cir. 1964); *Littell v. Udall*, 242 F. Supp. 635 (1965); *Udall v. Littell*, 366 F. 2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967), rehearing denied, 87 S. Ct. 952.

Justice Frankfurter said in *National Labor Relations Board v. Coca Cola Bottling Co.*, 350 U.S. 264, 269 (1956):

“Officers normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government . . .”

The Federal government and the States have a strong interest, in appropriate cases, to encourage their respective public officers to do their duty without fear of reprisal, but they also have a strong interest in protecting their citizens from malicious onslaughts against reputation and means of livelihood. This appeal ought to be decided by weighing the latter interest against whatever public policy may favor irresponsibility in contract attorneys for Indian tribes, and not by the mechanical extension of a rule of total immunity to an area where the policy and presuppositions that impelled its adoption have no application.

Since the split decision in *Barr* and *Howard*, the Supreme Court itself has reemphasized the “traditional concern of the State to protect its citizens against defamatory attack,”—in a setting where Federal preemption was urged as a defense. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 57 (1966).

Save where the defendant is an undoubted public officer of the executive branch, clearly acting within the scope of his public duties,¹⁵ the interest of the wronged citizen ought to receive the greater weight.¹⁶

¹⁵ Cf. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), for the current disposition of the Supreme Court to restrict the “perimeter” referred to in *Barr* and *Howard*; and see *Dombrowski v. Eastland*, No. 118, October term 1966 (May 15, 1967).

¹⁶ In anticipation of the answering brief, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), should be distinguished here. These cases deal with libel of a public figure, not libel by a public officer. They hold such libels enjoy qualified, not absolute, privilege; and their basis is constitutional law, overriding State common law; not as in *Barr* and *Howard*, Federal common

5. Federal policy looks with suspicion upon non-Indian attorneys for Indian tribes

The policy of protecting the private citizen's reputation and means of livelihood is, of course, one of State law. A Federal policy, however, also urges decision here in favor of the appellant against Littell. This Federal policy is not a general one drawn from the cases on Federal officers, but a specific policy relating to white attorneys for Indian tribes. Congress, from bitter experience, has little sympathy for this class of people.

Many years ago Congress took away from Indian tribes any independent authority which they may have had to engage attorneys, and made the tribe's hiring, the performance of tribal attorneys, and the payment of their fees subject to strict controls by the Secretary of the Interior. Acts of March 3, 1871, and May 21, 1872, R.S. §§ 2103-2106, 25 U.S.C. §§ 81-84. These statutes apply to all attorneys for Indian tribes. 25 C.F.R., parts 71 and 72. (The provisions dealing with tribes not organized under the Indian Reorganization Act are those applicable to the Navajo Tribe. See Request for Admission 9 and 10, T.R. 141, and answer, T.R. 156).

The legislative history of these Acts appears in House Report No. 98, 42nd Congress, 3rd Session (Serial 1578), which is a book of 793 pages, entitled "Investigation of Indian Frauds." The conclusion of the 42nd Congress,

law providing a Federal official with a defense to a claim under State common law. The rules are not reciprocal:

"For similar reasons, we reject any suggestion that in our references in *New York Times* . . . and *Garrison* . . . to *Barr v. Matteo*, 360 U.S. 564, mean that we have tried the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the function it serves." *Rosenblatt v. Baer*, 383 U.S. 75, note 10 on page 84.

The *New York Times* rule obviously has no bearing on this appeal, except in relation to the counterclaim, which is not now before this court.

based upon exhaustive study, was that attorneys for Indian tribes were heartless scoundrels, unprincipled, avaricious, Godless robbers, cunning villains, cormorants, bankrupts in morals, religion and politics, self-serving traducers, disloyal mercenaries, spoilers, etc., etc. Each and every one of the above epithets is used generally and specifically in the House Report. For example (at page 76):

“An Indian-claim agent is unlike most other people. He is generally bankrupt in morals, religion and politics; he will make unconscionable demands for the most imaginary services; he will make any kind of representation to the Indians against the character of his own people and government that, in his judgment, will over-reach his clients; will magnify his own importance and traduce others . . . Will threaten others in order to carry his point . . . [page 77]. In short, if there is anything that an Indian-claim agent will not do, it is that he will not treat his clients, the Indians, honestly.”

Congress believed that attorneys for Indian tribes were completely untrustworthy and had to be watched like hawks. The history of Littell's relations to the Navajos (see footnote 14 above) proves that the belief is still justified in some cases. Tribal counsel were to receive none of the professional confidence accorded to other lawyers. They were not trusted to negotiate freely with their clients, nor to bill them or receive payment from them without the closest Federal supervision. Even the normal attorney-client privilege of confidentiality has been abrogated by 25 U.S.C. § 82, which requires sworn service records to be submitted to the Commissioner of Indian Affairs by tribal lawyers “showing each particular act of service . . . giving date and fact in detail.” The Indian lawyer, one of whose principal activities is to prosecute claims against the United States, thus must report to an officer of his adversary everything he has done for his client, officer work as well as public appearances in court.

With such statutes in force, no tribal attorney can claim the high privilege of a public officer. He cannot even legitimately claim the respect of an ordinary practicing lawyer. The presumption of trustworthiness of the Federal officer, which underlies the *Gregoire* rule, is wholly lacking.

V. CONCLUSION

An unworthy member of the bar was engaged by contract to perform specified services for an Indian tribe. By a course of overreaching and bullying usurpation he achieved the status of "chief non-Indian adviser . . . in matters of policy as well as of law." The plaintiff, an honest young man, stood in his way; and to remove him he destroyed the young man's reputation and professional standing with his client. The appellant, unlike the unworthy member of the bar, did not sue a tribal official to keep his job; he sued the slanderous tribal attorney for damages.

The court below, in an unprecedented decision, has given the unworthy attorney absolute immunity from his malicious lies, but required the young lawyer to stand trial on a charge of libel for exposing the other attorney.

Such a decision is new law and bad law. Since the question is novel, its decision is a policy choice. Both State and Federal policy require reversal.

While the Secretary of the Interior and the District of Columbia circuit have already removed Littell from the opportunity for further depredations against the Navajos, they have not compensated his victims.

One of them here pleads for justice.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Certificate of Service

I hereby certify that I served three copies of the foregoing brief upon counsel for the appellee this date, by mailing the same, postage prepaid, addressed as follows:

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LAURENCE DAVIS
In propria persona

No. 21578

In the
United States Court of Appeals
For the Ninth Circuit

LAURENCE DAVIS,

Appellant,

VS.

NORMAN M. LITTELL,

Appellee.

Appeal from the United States District Court for the
District of Arizona

Brief of Appellee

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No. 21,578

In the

United States Court of Appeals

For the Ninth Circuit

LAURENCE DAVIS,

Appellant,

vs.

NORMAN M. LITTELL,

Appellee.

Appeal from the United States District Court for the
District of Arizona

Brief of Appellee

1. STATEMENT OF THE CASE¹

This action was brought by appellant Davis against appellee Littell in the Court below in May, 1961, seeking damages for slander. Littell moved for summary judgment, with supporting affidavits, on the ground that at all relevant times he had been General Counsel for the Navajo Tribe, and in effect its Attorney General; since the statements

1. Rule 18 of this Court requires a "Statement of the Case" from appellee only if that of appellant is controverted. Some of the essentials of the litigation below are found in Davis's "Statement of the

claimed to have been made by him were within the duties of that office, they were absolutely privileged under the doctrine of *Spalding v. Vilas*, 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631, and *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335. The District Court granted Littell's Motion for Summary Judgment, and entered judgment in favor of Littell and against Davis on the Complaint.² Davis then prosecuted this appeal.

The Order of the District Court granting the Motion for Summary Judgment contains the following language representing the conclusions of that Court with respect to Littell's claim of privilege:

Case". Unfortunately, sandwiched in between them, and in other portions of the brief, are a series of bitter diatribes against Littell, wholly unsupported by the record in this case and completely irrelevant to its decision.

As an example of both the irrelevant and the unsupported, the personal characteristics of the two litigants are described in a manner fit for a nineteenth century melodrama. Littell is an "unworthy former attorney" who has been cashiered for "diverting his client's assets to his own use and other forms of overreaching". He achieved his position by "bullying usurpation", and the history of his relations with the Navajos proves that Tribal attorneys have to be "watched like hawks". So much for the villain. The hero, on the other hand, is "an honest young man", who stood in Littell's way; indeed, he is both "honest and knowledgeable".

The only conceivable explanation for the inclusion of material such as this is Davis's apparent belief that if he can but sufficiently blacken the character of his opponent, he will prevail on this appeal. Littell has refrained in this brief from citing the abundant material available to refute the intemperate charges thus made by Davis, in the belief that to do so would be only slightly less offensive to the Court than to have made them in the first instance.

2. Davis's Statement of the Case concludes by stating that there remains pending below Littell's Counterclaim against Davis for libel. This statement, while technically correct, is misleading. Littell avowed to the Court below, and hereby avows to this Court, that he has no intention of pursuing the Counterclaim independently of the Complaint, and in the event of affirmance of the judgment below by this Court he will cause the Counterclaim to be dismissed with prejudice.

“The Navajo Tribe is a sovereign entity within the United States. *Littell v. Nakai*, 344 F. 2d 486; *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269. The position of the General Counsel of the Navajo Tribe, regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision.”

Littell's Affidavit, attached to his Motion for Summary Judgment, stated that at all pertinent times he had been the Chief Legal Officer of the Navajo Tribe, and that during this time there was substantial controversy and discussion within and without the Navajo Tribe as to two issues:

(A) Whether the Tribe should agree to waive its sovereign immunity from suit, which it had never done before, in response to strenuous efforts of persuasion on the part of Arizona Public Service Company, a private utility serving a large part of Arizona;

(B) The enforcement of state laws of the states of Arizona, New Mexico and Utah (in which the reservation lies) dealing with voting procedures and maintenance of polling places on the reservation.

Also attached to the Motion for Summary Judgment was a Certificate of Maurice McCabe, Director of the Administration Division of the Navajo Tribe, certifying that certain provisions of the two volume “Navajo Tribal Code” had been in full force and effect since August 6, 1959. Among these sections were the following, found in Chapter 5 of the Code, entitled “Executive Branch”, in Subchapter 2, entitled “Legal Department”.

“Section 821. Function:

“The Legal Department shall have the following functions:

“(1) Perform those functions generally required of a General Counsel’s office in organizations engaged in the administration of public affairs.

“....

“(7) Assist the members of the Tribal staff and Tribal Council in the conduct of relations with state and Federal officials.

“....

“(10) Make reports to the Chairman, the Advisory Committee, or the Tribal Council on any matters pertaining to the legal affairs of the Tribe when the best interests of the Tribe so require.”

“Section 823. Direction of Legal Work:

“The legal work of the Navajo Tribe shall be under the direction of the General Counsel who with associate attorneys, shall be responsible to the Chairman of the Tribal Council, subject to such instructions as they may receive from time to time from the Advisory Committee or the Navajo Tribal Council.”

The allegedly slanderous statements made by Littell respecting Davis occurred on four different occasions, all but the last taking place at Window Rock, Arizona, which is the seat of the government of the Navajo Tribe:

(A) During a conference between Littell; the Assistant General Counsel of the Tribe; Stewart Udall, then Congressman from Arizona’s 2nd District; and the latter’s Administrative Assistant, in the course of a discussion about the negotiations between Arizona Public Service Company and the Navajo Tribe, Littell is alleged to have said “They almost got Larry”.

More light is shed on the background of this incident by the following excerpt from plaintiff’s Complaint:

“Commencing sometime prior to November 3, 1959, and continuing until after May 9, 1960, the Navajo Tribe was engaged in negotiations with Arizona Public Service Company for the leasing of a thermo-

electric plant site on the Navajo Indian Reservation. Such negotiations were conducted on behalf of the Navajo Tribe by the defendant and other members of the Tribe's legal staff, and the plaintiff took very small part in them.

"Prior to November 3, 1959, no progress was made in said negotiations because the terms offered to the Navajo Tribe by Arizona Public Service Company were unfavorable to the Tribe. The plaintiff is informed and believes that certain persons privately approached Paul Jones, Chairman of the Navajo Tribal Council, at some date prior to November 3, 1959, and told him, in effect, that the defendant was unreasonably blocking these negotiations and that said defendant should be removed as General Counsel of the Navajo Tribe, and further informed said Paul Jones that they intended to go to Washington to confer with the Commissioner of Indian Affairs or other officials of the United States Department of the Interior in an attempt to arrange for the removal of the defendant as such General Counsel, and said persons requested Paul Jones to accompany them to Washington and to join in said request. The plaintiff did not knowingly have any communication whatever with these persons, and prior to the termination of plaintiff's contract with the Navajo Tribe, knew of the existence of the aforesaid plan only from hearsay information given to him by said Paul Jones and by the defendant."

(B) In the course of reports delivered in person to the Navajo Tribal Council, which is the principal governing body of the Navajo Tribe, Littell is alleged to have made the following statements:

(1) "Some great pleasant fellows who would give the reservation away very rapidly . . . after they got rid of me they would go over Joe and right on down

the line and get some of these fellows who would do what they wanted them to do.”

(2) “Recently (Davis) declined to obey instructions to prepare a study of (voting rights), so that early and late I have had to do it here . . . There were suggestions from Mr. Davis about compromising on voting rights.”

(3) “More as it turned out”. This statement was allegedly made by Littell before the Tribal Council, and its purportedly defamatory character stemmed from the fact that the remark immediately preceding it had stated that Davis’s plan for his own compensation would have resulted in him receiving as much pay as the General Counsel did.

(4) “He made a statement that his moving to Phoenix was my idea and not his idea. The statement is not only ungracious, ungrateful but false. I think a man who would misrepresent a fact in one way would misrepresent a fact in some other way . . .”

(5) Littell’s remarks (set forth in detail in paragraph 12 of the Complaint) deflating Davis’s claims that it was he who had been instrumental in “killing” Senate Bill 18 in the Arizona Legislature.

(C) The following remark was allegedly made by Littell at a staff meeting of the General Counsel and the other members of the Tribal legal staff, at which both Davis and Littell were present:

“They wanted to replace me with an Arizona Public Service attorney, like Larry Davis.”

(D) During an interview between Robert Piser, a reporter for the “Arizona Republic”, and Littell in Washington, D. C., on June 5, 1960, Littell is claimed to have made the following remark to Piser:

“Davis was fired because he was playing footsie with labor.”

It is not alleged that this remark was ever published in any of the articles written by Piser, but only that Littell made it to Piser.³

All of the foregoing statements appear either from the Complaint, the Answers to Interrogatories furnished by plaintiff, or the Affidavits of Littell and McCabe attached to the Motion for Summary Judgment. Obviously, it is on the basis of such documentation, rather than upon the unsupported factual assertions and accusations with which Davis's brief abounds, that this appeal must be determined.

2. SUMMARY OF ARGUMENT

For the reasons hereinafter set forth, the judgment of the District Court was correct and should be affirmed:

(A) The Navajo Tribe, as a quasi-sovereign entity, may and does extend to its high executive officials the same privilege against actions of this nature as are extended by the federal government, state governments, and governments of municipal corporations to their respective officials.

(B) The District Court in this diversity case properly looked to Navajo tribal law in determining whether the claim of executive privilege should be sustained.

(C) Applying the general case law of privilege, as developed by both federal and state courts, the high office which Littell occupied under the Tribe entitled him to claim the privilege, and the statements claimed to have been made by him were clearly within the scope of his duties in discharging that office.

(D) The wisdom of extending the doctrine of privilege need not be decided in this case, because no exten-

3. The Piser statement is treated separately in part 4(F) of this brief, because with respect to it there is an alternative ground upon which affirmance may be based.

sion of the doctrine is required to affirm the judgment below.

(E) The question of privilege was properly disposed of on Motion for Summary Judgment.

(F) Summary Judgment on the Piser statement was properly granted, not only on the basis of privilege but on the ground of a total absence of any evidence that Littell in fact made the statement.

3. ARGUMENT

(A) The Navajo Tribe, as a quasi-sovereign entity, may extend to its high executive officials the same privilege against actions of this nature as are extended by the federal government, state governments, and governments of municipal corporations to their officials.

The doctrine of executive privilege is founded entirely on case law, rather than statute. The Supreme Court of the United States in 1896 held that the Postmaster General was absolutely privileged against a suit for slander in the course of discharging his duties in *Spalding v. Vilas*, 161 U.S. 483, 40 L. Ed. 780, 16 S. Ct. 631 (1896). That doctrine was extended to lower echelons of federal officials in *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959), and *Howard v. Lyons*, 360 U.S. 593, 3 L. Ed. 2d 1454, 79 S. Ct. 1331 (1959). The doctrine has likewise established in many state jurisdictions, including Arizona and New Mexico, the two states in which the Navajo Reservation principally lies. *Long v. Mertz*, 2 Ariz. App. 215, 407 P. 2d 404 (1965); *Adams v. Tatsch*, 68 N. M. 446, 362 P.2d 984 (1961).

Davis appears to argue in his brief that because federal law grants the privilege to federal officials, and state law grants the privilege to state officials, and Littell is neither a federal official nor a state official, he may not claim the privilege. This argument has at least two flaws in it.

First, state law does not accord the privilege merely to state officials; in *Lipman v. Brisbane Elementary School District*, Cal. 2d, 359 P.2d 465, the privilege was extended to the trustee of a California school district, who was in no sense a state official. By the same line of reasoning, the federal courts as a matter of federal common law could extend the privilege to an official of an Indian Tribe, which, although quasi-sovereign is also subject to the jurisdiction of Congress, much in the same way that a school district, although independent in many respects, is also subject to the jurisdiction of the state.

Second, and more fundamentally, this argument overlooks the fact that the Navajo Tribe itself is a source of law. This Court, in *Littell v. Nakai*, 344 F.2d 486 (1965), observed that:

“Historically, the Indian Tribes were regarded as distinct political communities.” 344 F.2d at 488.

and found evidence in the decision of the Supreme Court in *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) a “strong congressional policy to vest the Navajo Tribal government with responsibility for their own affairs . . .” 344 F.2d 486 at 489.

In *Buster v. Wright*, 8th Cir. 135 Fed. 947 (1905), a distinguished Circuit Judge put the doctrine of Indian sovereignty in these words:

“The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or

by the superior power of the republic it is taken from it. . . .

“Originally an independent Tribe, the superior power of the republic early reduced this Indian people to a ‘domestic, dependent nation’ (*Cherokee Nation v. State of Georgia* 5 Pet. 1-20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a capital Constitution modeled after that of the United States, exercised legislative, executive and judicial functions within its territorial jurisdiction for more than half a century.”

135 Fed. at 950-951 (quoted with approval in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 8th Cir., 231 F.2d 89, 98 (1956)).

Cohen, in his work on Federal Indian Law (revision by the United States Interior Department of 1958), which was cited with approval by the Supreme Court in *Williams v. Lee*, *supra*, declares:

“The statutes of Congress, then, must be examined carefully in many instances to determine the limitations of tribal sovereignty rather than to determine its source or its positive content. What is not expressly limited oftens remains within the domain of tribal sovereignty simply because state jurisdiction is federally excluded and governmental authority must be found somewhere. *That is a principle to be applied generally in order that there shall be no general failure of governmental control.* (emphasis supplied)

Cohen, Page 396.

These doctrines were applied recently by the Court of Appeals for the 8th Circuit, which concluded that “Indian Tribes . . . still possess their inherent sovereignty excepting only where it has been specifically taken from them, either by treaty or by Congressional act.” *Iron Crow v.*

Oglala Sioux Tribe of Pine Ridge Reservation, 8th Cir., 231 F.2d 89 (1956). That holding led the Supreme Court of South Dakota to comment:

“That decision . . . results in the existence of three forms of government within the geographical confines of this state, viz: the United States of America, the state of South Dakota, and the Indian Tribes. *Employment Security Department v. Cheyenne River Sioux Tribe*, S. D., 119 N.W.2d 285 (1963).”

Both federal and state courts have had occasion to apply Indian law in cases where it was applicable, including laws governing property and succession, *Jones v. Meehan*, 175 U.S. 1, 44 L. Ed. 49 (1899), adoption, *Arenas v. United States*, 9th Cir., 197 F.2d 418 (1952), taxation, *Iron Crow v. Oglala Sioux et al.*, *supra*, and divorce, *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950).

In *Jones v. Meehan*, *supra*, the Supreme Court said:

“The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.

“But the elder Chief Moose Dung being a member of an Indian Tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the Tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior.”

175 U.S. at 29, 44 L. Ed. at 60-61.

The Navajo Tribe, then, is amply empowered to accord such a privilege to its high executive officers.

The Navajo Tribal Code is silent on the question of privilege, as it is on many other subjects. This makes it no dif-

ferent from the body of statute law of the federal government, or of the many states that have adopted the rule of executive privilege; in all of them the doctrine is a creature of case law, rather than of statute. In Title 7, Chapter 3, Section 34, Navajo Tribal Code, provides as follows:

“34. *Law applicable in civil actions.*

“

“(C) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter and dispute may lie.”

This provision, while not directly applicable because directed by its terms to Tribal Courts which do not have jurisdiction over non-Indians, suggests that the Tribe is perfectly willing to borrow from the law of adjoining states where its own laws do not speak to a particular point. Even without such a direction, a matter concerning government of an Indian reservation which is not covered by either federal or tribal law may be treated as a question of general law. *Turner v. United States*, 248 U.S. 354, 63 L. Ed. 291 (1919). As pointed out above, the doctrine of executive privilege is recognized by the federal courts in the case of officials of the federal government, and by the courts of both Arizona and New Mexico for officials of those states. The conclusion reached by the District Court on this point was inescapable: the Navajo Tribe would accord this same privilege to its high executive officials.

(B) The District Court in this diversity case properly looked to the Navajo Tribal Law in determining whether the claim of executive privilege should be sustained.

The District Court had jurisdiction of this action by reason of diversity of citizenship, and therefore was obliged

to apply the law of Arizona to the dispute before it, *Erie v. Topkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, including the Arizona conflicts of law rule, *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020. No decided Arizona case deals with the question of what law shall govern as to the defense of privilege in a slander action. This being the case, the federal court must determine for itself what rule the forum state would follow. *Kemart Corporation v. Printing Arts Research Lab., Inc.*, 9th Cir., 269 F.2d 375, 392 (1959). The Supreme Court of Arizona has stated that where not otherwise committed by precedent, it would follow the Restatement of the Law. *Ingalls v. Neidlinger*, 70 Ariz. 40, 216 P.2d 387 (1950). The Restatement, Conflict of Laws, provides as follows:

“Section 382(2):

“A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.

“Section 388:

“If there is a defense on the merits to the plaintiff’s claim by the law of the place of wrong, no recovery can be had on the claim in another state.”

Here the place of acting with respect to all but one of Littell’s alleged statements was the Navajo Tribal Capital of Window Rock, Arizona. Since Arizona itself recognizes executive privilege, *Long v. Mertz, supra*, there would be no policy of the forum militating against application of the privilege. Insofar as the Piser statement is concerned, the District of Columbia Courts have recognized the doctrine of executive privilege in *Glass v. Ickes*, D.C. Cir. 117 F.2d 273 (1940) and *Cooper v. O’Connor*, D.C. Cir., 99 F.2d 135 (1938).

A tentative draft of Restatement, Conflicts, 2d, appears to favor the “center of gravity” test adverted to by this

Court in *Kemart, supra*, for tort law generally. See 16 Am. Jur. 2d 117, "Conflict of Laws", Section 73. Since this draft has not yet been promulgated, there is no reason to think that the Arizona Courts would accord to it the weight that they have accorded to those Restatements bearing the final *imprimatur* of the American Law Institute. In any event, the "center of gravity" test leads to the same choice as does the "place of wrong" test. All but one of the statements were made at Window Rock, and their publication was limited to persons present—indeed, to persons present in some governmental capacity—at the Tribal Capital. Neither the interest of Arizona, where Davis resided, nor of the District of Columbia, where the Piser statement was made, but where neither the parties nor Piser resided, is even arguably as strong as is that of the Navajo Tribe.

The Supreme Court of the United States in *Howard v. Lyons*, 360 U.S. 593, 3 L. Ed. 2d 1454, 79 S.Ct. 1331 (1959) held that the federal privilege applied to a federal officer even though all of the operative facts occurred in the state of Massachusetts. While no one state or other subordinate jurisdiction has the power to impose its law throughout the country in this manner, each such jurisdiction could quite reasonably recognize the executive privilege conferred by another as a matter of comity, even where the "center of gravity" was not, as it is here, in the jurisdiction conferring the privilege. The Supreme Court of Arizona has approved the doctrine of comity in other circumstances in *Davis v. Standard Accident Insurance Co.*, 35 Ariz. 392, 399, 278 P. 384.

Judged by either of these tests, Arizona conflicts law would uphold in its courts a claim of privilege conferred under these circumstances by the Navajo Tribe.

(C) Executive privilege constituted a defense for Littell in this action, both because of the office he held and because of the duties he was performing at the time the alleged remarks were made.

It is undisputed that Littell occupied the post of General Counsel to the Navajo Tribe, created by the Tribal statute set forth in a preceding section of this brief, and that as such he was the Chief Legal Officer of the Tribe. The landmark case of *Gregoire v. Biddle*, 2d Cir., 177 F.2d 579 (1949) applied the privilege to the Attorney General of the United States. *Scolnick v. Lefkowitz*, 2d Cir., 329 F.2d 716 (1964) held it applicable to the Attorney General of New York, and *Matson v. Margiotti*, 371 Pa. 188, 88 Atl. 2d 892 (1952) held it applicable to the Attorney General of Pennsylvania. This Court, in *Sires v. Cole*, 9th Cir., 320 F.2d 877 (1963) extended the doctrine to the prosecuting attorney of a county; the Court of Appeals for the 3rd Circuit did likewise in *Bauers v. Heisel*, 3rd Cir., 361 F.2d 581 (1966).⁴ Davis's brief states that *Barr, supra*, and *Howard, supra*, are "shaky precedents", and urges that they not be applied to this case. However, the effect of *Barr* and *Howard* was to extend to subordinate federal officials the traditional doctrine of executive privilege laid down with respect to an officer of cabinet rank seventy-one years ago in *Spalding v. Vilas, supra*. It is not only unnecessary to extend *Barr* and *Howard* to uphold the judgment below in this case, but it is not even necessary to rely on these two cases; Littell occupied a position with the Navajo Tribe corresponding to that of Attorney General of a state or of a nation, and as such it takes no more than the holding in *Spalding v. Vilas* to extend the privilege to him.

4. Footnote 7 of the Court's opinion in *Bauers v. Heisel* collects more than a score of cases in which the privilege has been extended to prosecuting attorneys.

Davis in his brief refers to Littell as a "non-Indian contract attorney for an Indian Tribe". There is no doubt that Littell performed his services under a contract with the Tribe which had been approved pursuant to federal statute, by the Secretary of the Interior. But there is equally little doubt that he occupied the position of General Counsel, was the Chief Legal Officer for the Tribe, and was obligated to perform those duties set forth in the Navajo Tribal Code. This Court in *Robichaud v. Ronan*, 351 F.2d 533 (1965) observed that "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility . . ."; by the same token, neither the title of the office nor the distinction between an employee and an independent contractor should prevent the application of the privilege to an official who is in fact and law exercising high executive functions which the privilege was designed to protect.

In at least two other cases involving the doctrine of privilege, the defendant has been an independent contractor, rather than an employee, and nonetheless the doctrine of privilege was held applicable. In *Faselli v. Goff*, 2d Cir., 12 F.2d 396 (1926), the defendant was a Special Assistant Attorney General who had been appointed for the sole purpose of presenting one particular case to a grand jury. See 12 F.2d at 398-399. In *Koch v. Zuieback* U.S.D.C. S.D. Cal., 194 F. Supp. 651 (1961), affirmed on other grounds, 316 F.2d 1 (1963), the defendant was the chairman of a local draft board in Los Angeles (and therefore in all probability serving gratuitously, rather than even being an independent contractor).

The extraordinarily mechanical test by which Davis suggests that the privilege be accorded, based upon whether the official in question is a "public official" for purposes of liti-

gation having nothing to do with the sort of issues presented by this case, finds support in neither reason nor authority. The question involved in *Adams v. Murphy*, 8th Cir., 165 Fed. 304 (1908) was whether an attorney for the Creek Nation was entitled to a mandatory injunction restoring him to the "office" of attorney for the Creek Nation. No Tribal legislation established such a post, but instead empowered the principal chief to hire "an attorney at law or firm of attorneys at law". The Court held that since a "firm of attorneys" could not hold office, the Tribal statute had not intended to create any "office" to which the plaintiff could be restored by mandatory injunction.

The question which must be answered here is whether Littell in fact performed high-level executive functions in the course of his employment by the Navajo Tribe. Very likely one whose employment was only sporadic would not be required to perform such functions, but no help is obtained in answering the question from analyzing cases which turn on whether or not a writ of *quo warranto* will lie against a variety of claimed public officials.

There is ample support, both in reason and authority, for the conclusion of the trial judge in this case that:

"The position of the General Counsel of the Navajo Tribe regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision."

It is equally certain that the remarks claimed to have been made by Littell were undisputedly within the scope of his duties as General Counsel for the Tribe. As stated by the Supreme Court in *Barr v. Matteo, supra*, quoting from Judge Hand's opinion in *Gregoire v. Biddle, supra*:

"What is meant by saying that the officer must be acting within his power cannot be more than that the

occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . .”

360 U.S. 564, 572, 3 L. Ed. 2d 1434, 1442, 79 S. Ct. 1335.

With respect to the statements made by him in his report to the Tribal Council, the above quoted provisions of the Tribal Code enjoined a positive duty on the General Counsel to make such a report. With respect to the statement made in the meeting with Congressman Udall and his Administrative assistant, the Tribal Code enjoined the General Counsel to assist members of the Tribal staff and Council in the conduct of their relations with state and federal officials, and this conversation was quite clearly in the course of such official duty. With respect to the statement made in the staff meeting of Tribal attorneys, in addition to the necessarily implied power of supervision over a subordinate staff, the General Counsel was specifically charged with the direction of the “legal work of the Navajo Tribe”. Title 2, Section 823, Navajo Tribal Code.

(D) The wisdom of extending the doctrine of privilege need not be decided in this case, because no extension of the doctrine is required to affirm the judgment below.

Davis’s brief suggests that some courts have had real reluctance about applying the doctrine of executive privilege, and cites several cases which he contends support his claim. There are undoubtedly borderline areas in this branch of the law, as in all others, but this case does not involve any such borderline situations. None of the areas discussed below, in which a court may have suggested some limitation on the doctrine of executive privilege, are involved in this case.

(1) *Nature of tort.* There may well be a question, in the case of torts which inflict physical harm, as to how far the privilege will be applied in those cases, if the act complained of is otherwise within the "outer perimeter" of the official's duties. In *Chafin v. Pratt*, 5th Cir., 358 F.2d 349 (1966), the court observed in a footnote:

"Here, in fact, the alleged torts of libel and slander are not as grievous as the alleged torts of assault and battery and malicious arrest in *Norton. Barr* and *Lyons* both involved charges of libel and slander."
358 F.2d at 353.

The case before this Court, however, involved a charge of slander, against which the privilege was sustained not only in *Barr* and *Lyons*, but in *Spalding v. Vilas*. Drawing a line in this area, or in that of the level of official involved, would sensibly set at rest the problem envisioned by Davis of bulldozer drivers in the employ of contractors with state highway departments running over innocent bystanders with impunity.

(2) *Action under Civil Rights Acts.* The doctrine of privilege applies to executive officers, even when the action is brought under one of the Federal Civil Rights Acts. *Norton v. McShane*, 332 F.2d 855. However, the Court observed in that case that "the doctrine may be given more limited application in those suits than it has been given at common law." Later, the same Court apparently elevated this distinction into a holding in *Pierson v. Ray*, 5th Cir., 352 F.2d 213 (1965).

Again, however, the present action was simply one at common law for slander and loss of employment,⁵ and the

5. Executive privilege is a defense to a claim for damages from loss of employment resulting from the claimed slander, as well as to claims for resultant general damages. *Chafin v. Pratt*, *supra*; *Carr v. Watkins*, 277 Md. 578, 177 A.2d 841.

Court below had jurisdiction only by reason of diversity of citizenship. To the extent that the very strained effort in Davis's brief to show that the federal rule of absolute immunity is "judicial legislation to enforce the Supremacy Clause" is based on *Norton v. McShane*, *supra*, it offers no help in deciding this case.

(3) *Minor employees.* *Kelley v. Dunne*, 1st Cir., 344 F.2d 129 (1965) refused to extend absolute immunity to a postal inspector who was claimed to have falsely represented that he had a search warrant, wrongly searched and seized the property of the plaintiff, and then assaulted the plaintiff. The Court said:

"Applying these principles to the cases at bar there would seem a substantial difference between a public information officer uttering a defamatory statement in the course of an official announcement, for example, and a postal inspector making a search without, so far as presently appears, a consent or a warrant or a belief that there was a warrant, and volunteering slander."

344 F.2d at 133.

In *Hughes v. Johnson*, 305 F.2d 67 (1962), this Court affirmed the dismissal of an action for damages for trespass by game wardens in the course of a search of premises of the plaintiff, but remarked that a search in violation of the plaintiff's constitutional rights could not be within the scope of the duties of these officials.

No doubt in the case of a minor public official, where the need for the privilege is minimal, there remain questions unanswered by the decided cases as to just how far the privilege will extend. Equally certain, however, is it that no resolution of these questions is involved in the case now before this Court. Littell, as previously stated, occupied a position with the Tribe comparable to the Attorney General

of a state, or of the United States, and as such he is embraced within the doctrine of privilege as first enunciated by the Supreme Court of the United States in *Spalding v. Vilas, supra*.

(4.) *Policy Considerations.* If it were necessary to adduce additional reasons than those stated in the decided cases for the affirmance of the judgment here, they are not difficult to find. This Court, in *S. and S. Logging Co. v. Barker, supra*, quoted from the opinion in *Gregoire v. Biddle* as follows:

“It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.”

366 F.2d at 619.

If ever the reasoning behind the doctrine of privilege was peculiarly applicable, it would seem to be in the representation of Indian Tribes. Still an alien people in today's modern world, the tribes are struggling to achieve effective self government at the very time when they are beset by a multitude of conflicting interests. The Tribal Council, to

which Littell was charged with the duty of reporting, is of course primarily responsible to its Tribal constituents. Yet at the same time it is, in many respects, subordinate to the vast bureaucracy which comprises the Bureau of Indian Affairs in the Department of Interior of the Federal Government. As if this were not enough, outside commercial interests are now seeking access to the Tribal reservations and Tribal resources; access which may be highly beneficial to the Tribe or thoroughly disruptive to its interests, depending upon the sort of agreements that are reached. Finally, there is the ever present conflict between the interests of the Tribe and the interests of the states in which the reservation is located in applying their own laws to the greatest extent possible.

Elmer F. Bennett, in his article "Federal Responsibility for Indian Resources", 20 Fed. Bar. J. 255, 258-259 sketches briefly some of the developments taking place on the Navajo Reservation at the very time that the occurrences alleged in the Complaint were occurring:

"... If long term leases are to be used effectively in connection with industrial developments desired by the Navajos, they must, in some instances, be granted for terms longer than fifty years in order to permit long-term financing for maximum economic results. More leeway is needed also for the Navajos to manage nearly one hundred thousand acres of lands which the Tribe has purchased and to which it holds title in fee simple.

"The Department has supported legislation in Congress for transferring to the Navajos full title and responsibility for all irrigation projects on the reservation. A desire and willingness to take over operational responsibilities for these projects has been expressed in resolutions of the Navajo Tribal Council of September 18, 1957, and February 14, 1958. Tax-exempt benefits for the facilities of, and the income from, these projects are to continue. Construction costs

amount (sic) to about five million nine hundred thousand would be repaid by the Navajos under this plan.

"Navajo lands are bringing high bonus bids. As of the first of this year the total income received by the Tribe and individual Navajo land owners from oil and gas leases on their lands had exceeded ninety million dollars over the past ten years. Of this amount, more than fifty-nine million dollars represented bonuses received by the Navajo Tribe in the two and one-half years prior to January 13, 1959."

Even in the economically simpler era of a generation ago, the invective employed in discussion of Indian issues was spirited, giving some indication of the many political and economic crosscurrents at play in this area. John Collier, long time Commissioner of Indian Affairs during most of the period between 1933 to 1950, was described by one observer of the Indian scene as "a true mystic . . . who sought to keep the Navajo intact in his hogan and to maintain the reservation as a natural museum in which the Indians moved, ate, and slept . . ." The activities of one of Collier's successors, who apparently took a different tack, were summarized by a former Secretary of the Interior in the following words:

"A blundering and dictatorial tin-Hitler tossed a monkey wrench into a mechanism he was not capable of understanding."

Abbott, "American Indians, Federal and State Citizens", 20 Fed. Bar. J, 248, 251.

The Commissioner so attacked, Dillon Myers, apparently replied in kind:

"So, too, the Commissioner's numerous letters to members of Congress who report Indian grievances, to editors who criticize his activities, and to thousands of private citizens who have voiced complaints concerning

Bureau delays and mistakes, regularly charge that the Bureau's critics are either themselves dishonest or the dupes of dishonest Indian lawyers." Cohen, "The Erosion of Indian Rights", 62 Yale L. J. 348, 386.

Surely no governing body anywhere in the United States was more in need than the Navajo Tribal Council of some voice who would "call them as he saw them", uninfluenced by surrounding pressures, and undeterred by the threat of vexatious litigation arising out of his official conduct. The undisputed facts, compiled in large part from Davis's own complaint, as to the background of the alleged statement "they almost got Larry" (*Ante*, p. 4) buttress this conclusion more effectually than would a lengthy theoretical discourse.

(E) The question of privilege was properly decided on motion for summary judgment.

Davis's brief suggests no impropriety in the lower courts having determined the question of privilege on a Motion for Summary Judgment, and there can be little doubt that such procedure was proper. At common law, the question of whether an allegedly defamatory statement was privileged was one of law for the Court, both in Arizona, *Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 264 P.2d 413, 39 ALR. 2d 1382, and elsewhere. 33 Am. Jur. 279, "Libel and Slander", Section 296.

Unlike issues requiring a determination of an individual's state of mind, as in *Consolidated Electric Co. v. United States*, 9th Cir., 355 F.2d 437, 438 (1966), or issues of negligence as in *Rogers v. Peabody Coal Co.*, 6th Cir., 342 F.2d 749 (1965), which have been held not to lend themselves to adjudication on motion for summary judgment, the opposite is true with respect to the applicability of the doctrine of executive privilege. Almost all of the recent decisions on the

point from this Court,⁶ and elsewhere⁷ has been cases where the trial court either granted a motion for summary judgment or a motion to dismiss.

Indeed, if it were to be held that the applicability of the doctrine of executive privilege cannot ordinarily be determined in advance of trial of the slander action on its merits, the usefulness of the doctrine would largely vanish. To quote once more from *Gregoire v. Biddle*, *supra*:

“The justification . . . is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”

177 F.2d 579.

(F) Summary judgment on the Piser statement was properly granted, not only on the basis of privilege, but on the basis of a total absence of any evidence that Littell in fact made such a statement.

The Court below concluded that the statement made to the newspaper reporter Piser by Littell in the District of Columbia was embraced within the doctrine of executive privilege. The Court stated its conclusion as follows:

“With respect to the utterance attributed to the defendant in conversations with the news media, it is the conclusion of the Court that such communications are also privileged. *Barr v. Matteo*, *supra*; *Glass v. Ickes*, 117 F.2d 273; *Mellon v. Brewer*, 18 F.2d 168; *Matson v. Margiotti*, 88 Atl. 2d 892.”

6. *S. and S. Logging Co. v. Barker*, 366 F.2d 617 (1966); *Sires v. Cole*, 320 F.2d 877 (1963); *Hughes v. Johnson*, 305 F.2d 67 (1962); *Bershad v. Wood*, 290 F.2d 714 (1961).

7. *Chafin v. Pratt*, 5th Cir., 358 F.2d 349 (1966); *Norton v. McShane*, 5th Cir., 332 F.2d 855 (1964); *Bauers v. Heisel*, 3rd Cir., 361 F.2d 581 (1966); *Scolnick v. Lefkowitz*, 2d Cir., 329 F.2d 716 (1964).

Such a conclusion was clearly proper. In *Glass v. Ickes*, D.C. Cir., 117 F.2d 273 (1940) the Court said:

“It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute . . .; or even that they should be specifically directed or requested by a superior officer. . . . It is sufficient if they are done by an officer ‘*in relation to matters committed by law to his control or supervision*’ . . .; or that they have ‘*more or less connection with the general matters committed by law to his control or supervision.* . . .’”

However, there is another and completely separate ground for affirming the judgment with respect to the claim for slander based on the Piser interview. Littell’s Affidavit, attached to his Motion for Summary Judgment, contains the following statement:

“When Piser came to Washington, D. C., your affiant was interviewed by him in affiant’s office about developments on the Navajo Reservation, but at no time did affiant say to Piser the statement attributed to him in paragraph 14 of the amended Complaint, nor did affiant make any statement whatsoever which could in any way or manner be construed to mean what plaintiff alleges in said paragraph.”

The Little Affidavit was dated May 6, 1966, and was filed along with the Motion for Summary Judgment shortly thereafter, with the motion originally being noticed for May 24, 1966. The motion was not actually argued to the Court until September, 1966, however, and just prior to the argument on the motion Davis filed his own Affidavit in opposition, dated September 13, 1966. The only statement contained in that Affidavit about the Piser interview is the following:

“I have been personally informed by Robert Piser, and believe, that the defendant Norman M. Littell made

the statement to Piser which is alleged in paragraph XIV of the amended Complaint in the above entitled action, and I expect to prove the making of such statement at the trial of this case by the testimony of Robert Piser.”

Thus, nearly four months after the service of the Littell Affidavit, Davis’s only support for this allegation in his Complaint was the hearsay statement that Piser told him that it happened that way. But this simply will not do. Rule 56(e), Fed. Rules Civ. Proc., provides as follows:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .”

Failure to comply with these requirements means that the affidavit will not be considered by the Court:

“To the extent that the affidavit submitted by Unions and Schwab’s attorneys are based upon personal knowledge, the information they provide is of little assistance to the Court. The statements they contained which are not based upon personal knowledge will not be considered by the Court.”

Union Insurance Soc. of Canton, Ltd. v. William Gluckin and Co., 2d Cir., 353 F.2d 946, 952 (1965).

Davis had nearly four months between the filing of the Littell Affidavit, and the execution of his own affidavit, in which he or his attorneys could have obtained an affidavit from Piser or some other form of admissible proof that Littell had in fact made the statement in question. Their failure to do this leaves Littell’s flat denial under oath of the allegation of the Complaint standing uncontradicted, and for this reason alone he is entitled to summary judgment on that portion of the Complaint.

“Even after taking into full consideration the heavy burden resting on a moving party to make a clear showing of what the truth is, the controlling principle remains that ‘. . . an opposing party who has no countervailing evidence and who cannot show that any will be available at the trial (is not) entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial.’”

International Longshoremen’s and Warehousemen’s Union v. Kuntz, 9th Cir., 334 F.2d 165, 169 (1964).

4. CONCLUSION

In deciding a case such as this, it is of course necessary to assume, without deciding, that the allegedly slanderous statements set forth in the Complaint were actually made by Littell. It is not only unnecessary, but wholly improper, however, to assume that the unsupported and irrelevant statements of purported fact contained in Davis’s Brief on Appeal are true. The issue before the Court below, and now before this Court, is whether the General Counsel of the Navajo Tribe of Indians was absolutely privileged, if, during the course of conducting business which was confided to him by the provisions of Tribal statute, he in fact slandered one of his subordinate employees. Both the numerous cases which have construed the doctrine of executive privilege, and the principle supporting the doctrine—that high level public officials should not be exposed to slander suits for “calling them as they see them”—indicate that Littell’s statements were well within a scope of the privilege. That being the case, the judgment below should be affirmed.

Respectively submitted,

WILLIAM H. REHNQUIST
Attorney for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM H. REHNQUIST

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE)
KENNETH GRASSMAN,)

Appellants,)

Vs)

UNITED STATES OF AMERICA,)

Appellee.)

No. 21584 ✓

PETITION FOR RE-HEARING
ON APPEAL

FILED

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U.S. DISTRICT COURT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE)	
KENNETH GRASSMAN,)	
)	
Appellants,)	No. 21584
)	
Vs.)	
)	
UNITED STATES OF AMERICA,)	PETITION FOR RE-HEARING
)	ON APPEAL
Appellee.)	

Defendant, Wesley Jay Myers, respectfully
moves for an order permitting a re-hearing on the
appellate process initiated by Defendant, argued
8 January 1968 and the subject of opinion by this
Court.

The original opinion affirmed judgment of the U. S. District Court for Western District of Washington, Northern Division.

BASIS FOR PETITIONED RE-HEARING

The published opinion of the Court included a comment related to Defendant's denial of a right to confront and cross examine a witness.

Purported "testimony" of the witness (Miller) was delivered by implication through the mouth of the Prosecutor.

Defendant was disarmed and left without opportunity to explore the substance and truth of damaging assertions allegedly made by the witness en absentia.

This Court's opinion denied Constitutional violation in the following language:

"Finally, it is said that the Defendants were unconstitutionally deprived of their right to confront and cross-examine Miller.

They never asked for that right; (emphasis supplied) no testimony of Miller was used against them."

The transcript of the trial includes the following language:

By Mr. Rousso:

"If there is a Mr. Miller, and such a statement was made to him, the opportunity was present for the government to bring it in on their direct and to testify to any conversation made with this Defendant. That was not done."

There are other instances wherein "Miller's" presence was sought by Defendants.

It is patent that this appellate tribunal was unaware of language which included a valid request that "Miller" be produced coupled with a clear objection that "Miller's" outside statements be not used against Defendants.

The use of such evidence is violative of Amendment VI, U. S. Const. and the use of "Miller's"

damaging statement delivered through the mouth of the Prosecutor is also clearly hearsay.

The Prosecutor was, in effect, testifying unsworn and was immune from cross examination. The purported meaning of the statement was sinister to a degree that would tip the scale away from acquittal and toward condemnation.

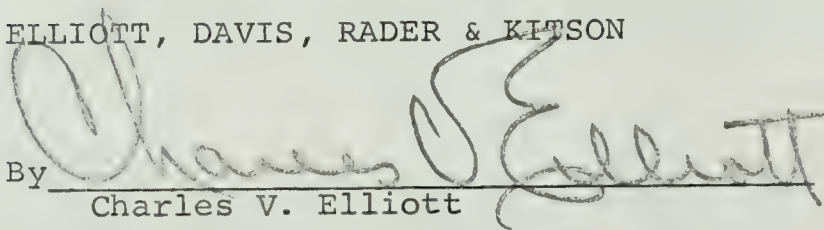
On basis of the foregoing we request opportunity to present the proof of this Constitutional violation supported by authoritative decision.

DATED this 28th day of March 1968.

Respectfully submitted,

ELLIOTT, DAVIS, RADER & KITSON

By


Charles V. Elliott

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE)	
KENNETH GRASSMAN,)	
)	
Appellants,)	No. 21584
)	
Vs.)	
)	
UNITED STATES OF AMERICA,)	CERTIFICATE OF COUNSEL
)	
Appellee.)	

Defendant, Wesley Jay Myers, has filed a petition for re-hearing and the undersigned, as counsel, hereby states to the Court that the petition is well-founded and is not entered for purpose of delay.

ELLIOTT, DAVIS, RADER & KITSON

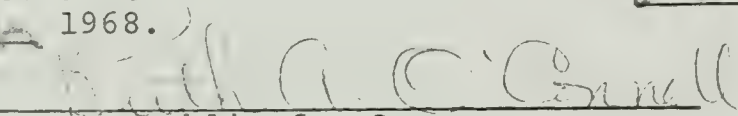
By


Charles V. Elliott

STATE OF OREGON)
) ss.
County of Mult.)

Subscribed and sworn to before me this
day of March 1968.

284


Notary Public for Oregon

My Commission Expires: 12/10/71

FOR THE NINTH CIRCUIT

No. 21584

APPELLANTS' BRIEF ON APPEAL

Appellee.

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UNITED STATES COURT OF APPEALS

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WESLEY JAY MYERS and DALE)	
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Defendant, Wesley Jay Myers, respectfully
moves for an order permitting a re-hearing on the
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This Court has jurisdiction by virtue of 28 USC Section 1291.

The indictment charges offenses against the Laws of the United States.

The Transcript of Proceedings will be referred to as Tr.

STATEMENT OF THE CASE

The Appellants, Wesley Jay Myers and Dale Kenneth Grassman, were jointly indicted on two counts, Count I charged illegal transportation of a motor vehicle from Portland, Oregon to Seattle, Washington, and Count II recited a similar charge involving a different motor vehicle, each Count alleged to be in violation of Title 18, U. S. Code Section 2312.

IDENTIFICATION OF THE PARTIES

Wesley Jay Myers and the co-appellant, Dale Kenneth Grassman, were engaged at Portland, Oregon in the business of purchasing wrecked motor vehicles, accomplishing necessary repairs or replacement of parts and the subsequent resale of the automobiles.

In the operation of this enterprise, the two Appellants were engaged in an informal association. The repair shop and yard was maintained in the City of Portland, Oregon principally by the Appellant, Grassman. The Appellant, Myers, was most often gone from the shop and spent little time there.

Journal of Management Inquiry 19(4) December 2010 399

1. The first step in the process of identifying a potential threat to national security is to determine whether the information in question is classified under the Espionage Laws. This is done by comparing the information to the criteria set forth in the Espionage Laws, which define the types of information that are considered to be of such a nature that their disclosure would be injurious to the national defense.

...the following:

At that time, the only person who was in the room was the person who was in the room at that time.

The Appellant, Myers, did nothing by way of physical repair of the wrecks.

The Appellant, Myers, travelled often to California in search for wrecked vehicles, the condition of which would permit repair to a point where the automobile could subsequently be sold. The wrecks purchased in California or other areas were loaded aboard a transport vehicle and brought to the Portland shop where the vehicles were turned over to the Appellant, Grassman. (Tr. 313).

The Appellant, Myers, was licensed as an automobile dealer and had posted the bond as required. (Tr. 307).

Generally, Myers sought wrecked or salvaged motor vehicles and submitted bids or offers of purchase. Grassman stayed in the shop and supervised the repairs or restoration of the wrecked vehicles after their delivery from the source of purchase.

Vehicles repaired in Portland, Oregon were, on occasion, offered for sale through markets in the State of Washington. This point of sale was adopted for the reason that a better price or a more rapid turn over could result.

"The vehicles involved in these charges as allegedly stolen were purchased by Grassman from a third party, Lee, during absence of Myers from the Portland area." (Tr. 355 - 362).

Myers had no knowledge that the vehicles had been purchased independently by Grassman, nor did Myers know that identification insignia had been substituted by Grassman. (Tr. 365-367, 395-400).

The other facts are quite unimportant for purposes of this appeal, however, of serious importance is the content of questions asked by the Prosecutor in cross-examination of the Defendant, Grassman.

This important part of the trial record is as follows:

Q On or about August, 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?

Mr. Rouso: Objection, your Honor.

The Court: There is no ---

Mr. Rouso: (Interposing) Object to that. If Mr. Miller wants to testify, let him come to Court.

The Court: Sustain the objection.

Mr. Hess: I will rephrase it.

By Mr. Hess:

Q (Continuing) On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.

Q As a matter of fact, Mr. Grassman, after Mr. Myers was arrested on June 18th ---

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(Mr. Elliott rises.)

The Court: Just a minute.

Mr. Elliott: Your Honor, I have no objection but I didn't hear this question of Mr. Bess relative to going somewhere. I couldn't get him when he asked the witness whether he made a statement he was going to take everyone with him. I did not understand that.

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter,

"Q On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.")

Mr. Elliott: Your Honor, I am going to object to it because --- making a statement to whom? The question is a highly prejudicial question and it has no basis in the testimony at all. It is simply a wild spear thrown in the direction of the witness.

Mr. Rousso: Your Honor ---

Mr. Elliott: (Interposing) If he wants to lay ground for this, let him do it.

Mr. Rousso: Your Honor, I would like the jury to be excused, if possible.

The Court: To be excused?

Mr. Rousso: Just for a moment or two.

The Court: All right, Members of the Jury, the

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THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

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Court will hear from Counsel on this matter in the absence of the Jury and I will excuse you and ask you to heed the admonition given you before at this time.

(Whereupon, the Jury retired from the courtroom).

The Court: Do you wish to make a statement?

Mr. Rousso: Yes, Your Honor. At this time, on behalf of the Defendant Grassman, I would move for a mistrial.

We have a situation here where the condition which the government has thrown in this statement has to be highly prejudicial regardless of how the man answered it.

If there is a Mr. Miller, and such a statement was made to him, the opportunity was present for the government to bring it in on their direct and to testify to any conversation made with this Defendant. That was not done.

If we allow this type of thing, why then we could spend the next day in here --

The Court: (Interposing) I am inclined to agree it is erroneous and somewhat prejudicial.

I will ask, Mr. Hess, on what theory you ask this? It is highly improper, it seems to me.

Mr. Hess: Your Honor, I asked it on this basis: An out-of-court statement made by the witness and he was present there.

The Court: If he said the moon was made of green cheese, is that material?

Mr. Hess: If it relates to this case, it is,

your Honor.

The Court: I don't know who Miller is. If you have an admission, it seems to me you have to bring it in on direct.

Mr. Hess: Well, I am sorry. I had a basis in a report.

The Court: Why don't you put a witness on?

Mr. Hess: Frankly, I didn't have reason to rely on the veracity of Mr. Miller.

Mr. Elliott: We join in the motion.

The Court: I will strike it. I will not declare a mistrial.

I certainly will have to tell them you are in error in asking it and they are to disregard it entirely.

I will caution you, Mr. Hess, that it is not proper for the government to throw in damaging statements.

Mr. Hess: I have a basis in the record that it was made.

The Court: That doesn't make any difference.

When was it in the evidence that he said that?

What do you rely on, at all?

Mr. Hess: I am relying on him as a witness.

The Court: What witness on direct?

You can not come in on cross examination and ask something by way of an admission unless you have some testimony

THE COURT: I have now called the first witness.

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to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it: but it seems to me that you are seeking to get in testimony here that could be prejudicial.

I am hesitant to grant a motion for a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind.

Mr. Elliott: Your Honor, may I make a further statement?

The Court: Go ahead.

Mr. Elliott: Your Honor recognizes the respect we have for this Court and this is discretionary with your Honor on this motion but it is our contention here that irrefutable damage has been done because of this question and answer and we simply want to join~~x~~ for the Defendant Myers.

The Court: All right.

Mr. Elliott: Thank you.

The Court: I assume, Mr. Hess, it is your thought that this constitutes, in some way, some kind of admission?

Mr. Hess: That was my thought, your Honor - an admission of the Defendant Grassman.

(Whereupon, the jury was returned to the courtroom).

The Court: Members of the Jury:

I am going to advise you at this time with regard to the testimony that came in a few minutes ago to which objection

AS ABOVE STATED, THE NEW YORK PUBLIC LIBRARY
HAS BEEN OPENED TO THE PUBLIC SINCE THE
1ST OF JANUARY, 1894, AND HAS SINCE THAT
DATE RECEIVED THE FOLLOWING DONATIONS:

THE NEW YORK PUBLIC LIBRARY
HAS BEEN OPENED TO THE PUBLIC SINCE THE
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was made.

It is my view that it was a highly prejudicial type of question and should not have been asked by the Government,..... (Tr. 400 Line 25 through Tr. 406 Line 2.)

SPECIFICATION OF ERRORS

Specification of Error Number 1.

Error in refusal to grant an immediate mistrial following improper questions of the prosecutor, in that the implication and innuendo of the questions was irrevocably prejudicial to Defendants.

Specification of Error Number 2.

Error inherent in the situation which permitted jury to hear evidence purportedly from the mouth of "Miller" who was never placed on the witness stand and to thereby deny to Defendants the right to confront this "witness" and to cross-examine him as provided by Amendment VI, Constitution of the United States.

Specification of Error Number 3.

Error in assertion of the court to the jury while seeking to correct the impropriety of the prosecutor and error in court's ruling that the gross violation of Defendants rights by the prosecution could be corrected in the jurors minds by admonishment that the improper evidence be disregarded.

It is up to the State to ensure that the

type of service and quality of care are of the

highest possible standard. The State is required to

THE STATE'S OBLIGATION

According to the State's

obligation to ensure that the

highest possible standard of care is maintained, the State

is required to ensure that the

highest possible standard of

care is maintained in the

State's health care system.

The State is required to ensure that the

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in the State's health care system.

The State is required to ensure that the

ARGUMENT

ERROR NO. 1.

Refusal to grant a mistrial upon immediate motion of Defendants following the question put to Defendant Grassman during cross-examination by the prosecutor: (The jury present).

"On or about August 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?" (Tr.400-401).

The prosecutor was permitted to rephrase the question after objection by Defendants.

"On or about August 19th did you make any statements to the effect that if you went down the tube you were going to take everyone with you?" (Tr. 401).

The jury was still present when the question was put the second time.

After second objection, the jury was removed and Defendants moved for a mistrial.

The court then unequivocally asserted that the questions were prejudicial and without foundation.

"You cannot come in on cross-examination and ask something by way of an admission unless you have some testimony to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it, but it seems to me that you are seeking to get in testimony here that could be prejudicial.

I am hesitant to grant a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind." (Tr. 404-405).

The guidelines of propriety are clearly asserted by United States Supreme Court in:

Berger Vs. U. S. - 295 U.S. 78

55 Sup. Ct. 629

79 L. Ed. 1314.

The opinion states:

"Error in the conduct of a prosecuting attorney while examining witnesses is not cured by sustaining objections to some of his questions, insinuations, and misstatements, and instructing the jury to disregard them, where the situation was one which called for stern rebuke and repressive measures, and it is impossible to say that the evil influence upon the jury of those acts of misconduct was removed by such mild judicial action as was taken.

ERROR NO. 2.

The right to confront and cross-examine "John Miller" is a Constitutional guarantee and Defendant was denied this right.

That the testimony of "John Miller" was infected with untruth and doubt was clearly admitted by the prosecutor when he spontaneously replied to inquiry of the Court:

I am pleased to hear of your success in the
last year's work. It is a great relief to
hear that you have been able to complete the
collection of the first part of the series.

The collection of the second part of the series
by the end of the year is a great task.
I hope you will be able to complete it by
the end of the year. I am sure you will
be able to do so.

The collection of the third part of the series
is a great task. I hope you will be able to
complete it by the end of the year. I am
sure you will be able to do so. The collection
of the fourth part of the series is a great
task. I hope you will be able to complete it
by the end of the year. I am sure you will
be able to do so. The collection of the fifth
part of the series is a great task. I hope
you will be able to complete it by the end of
the year. I am sure you will be able to do
so.

The collection of the sixth part of the series
is a great task. I hope you will be able to
complete it by the end of the year. I am
sure you will be able to do so. The collection
of the seventh part of the series is a great
task. I hope you will be able to complete it
by the end of the year. I am sure you will
be able to do so. The collection of the eighth
part of the series is a great task. I hope
you will be able to complete it by the end of
the year. I am sure you will be able to do
so.

"Frankly, I didn't have a reason to rely on the veracity of Mr. Miller."

This admitted recognition by the prosecutor that "Millers" statement was not worthy of belief supplies the reason why "Miller" was not to be confronted in Court by the Defendants and not to be exposed to cross-examination by defense counsel.

Yet, the prosecutor was willing to vicariously burden the Defendants with the lies he attributed to the elusive "John Miller".

This type of conduct is the subject of comment in:

Ross Vs. U. S. 180 F 2d 160.

"In a criminal prosecution, the United States attorney is a representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest is, not that it will win the case, but that justice shall be done."

ERROR NO. 3.

The Court committed error by appraisal of the situation, created before the jury by the prosecutor, to the effect that the improper evidence could be erased from the mind of each of the twelve jurors by statement that the

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evidence was not to be considered.

The grave apprehension of the court was apparent when the jury was addressed as to the importance of the questions.

The Court in admonishing the jury sought to correct the prejudice supplied by the prosecution and then in obvious inadvertance added emphasis to the harm:

"I emphasize that caution to you because the Defendants are entitled to a fair trial and you must find them guilty solely from the evidence that is proper and not from statements thrown in by error (emphasis supplied). (Tr. 406).

No disrespect to the Court is intended but the gravem of the situation is explained perhaps by the spontaneous exclamation that the jury must find the Defendants guilty.

It is submitted that each of us as lawyers are boldly aware that a juror hears each word spoken by a Judge in any trial and receives each word of the Court as a thing especially bearing the mark of importance, truth and integrity. This is as it should be, but the infrequent irregularities bear some marks of dignity as do the rigid truths. This attitude of a jurors mind may well result in misunderstanding and we respectfully submit that any word spoken by a Court to a juror should be sterile of any remote insinuation that a Defendant should be found guilty. The weight of a single

without any risk to themselves.

The three specimens of the same are attached.

When the 2nd was taken it is the same as the

specimens.

The 3rd is somewhat the same as the

specimens, but the 4th is somewhat the same

as the 3rd, but the 5th is somewhat the same

as the 4th, but the 6th is somewhat the same

as the 5th, but the 7th is somewhat the same

as the 6th, but the 8th is somewhat the same

as the 7th, but the 9th is somewhat the same

as the 8th.

The 10th is somewhat the same as the

specimens, but the 11th is somewhat the same

as the 10th, but the 12th is somewhat the same

as the 11th.

The 13th is somewhat the same as the

specimens, but the 14th is somewhat the same

as the 13th, but the 15th is somewhat the same

as the 14th, but the 16th is somewhat the same

as the 15th, but the 17th is somewhat the same

as the 16th, but the 18th is somewhat the same

as the 17th, but the 19th is somewhat the same

as the 18th, but the 20th is somewhat the same

as the 19th, but the 21st is somewhat the same

as the 20th, but the 22nd is somewhat the same

statement by the Court may well outweigh the testimony of many witnesses or the importance of compelling evidence.

Improper evidence cannot be erased and this premise is supported in *Berger Vs. U. S.* (Previously cited).

"Error..... while examining witnesses is not cured by sustaining objections, to (prosecutors)..... insinuations and misstatements and by instructing the jury to disregard them."

In *Turner Vs. Louisiana* 379 U.S. 466, the Court states:

"In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a Defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the Defendant's right of confrontation, of cross-examination and of counsel."

It is respectfully submitted that these rights must not be subverted.

CONCLUSION

The judgment should be reversed.

Respectfully,

ELLIOTT, DAVIS, RADPR & KITSON
1220 S. W. Sixth Avenue
Portland, Oregon
Phone: 224-7271

By Charles V. Elliott

STATE OF OREGON)
) ss.
County of Multnomah)

I hereby certify that I served the foregoing Brief on Appeal on GERALD W. HESS, Assistant United States Attorney, on the 14th day of September, 1967, by mailing to him a true and correct copy thereof, certified by me as such. I further certify that said copy was placed in a sealed envelope, addressed to said GERALD W. HESS, Assistant United States Attorney, at 1012 U. S. Court House, Seattle, Washington 98104, his last known address, and deposited in the Post Office at Portland, Oregon on the 14th day of September, 1967, and that postage thereon was prepaid.

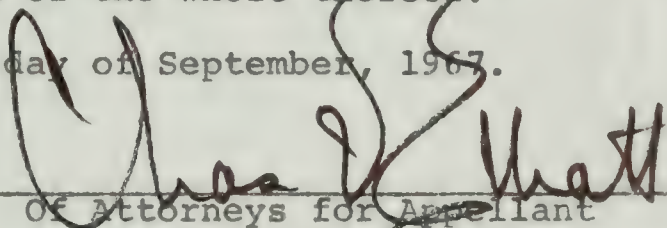
/s/ Charles V. Elliott

Of Attorneys for Appellant
Wesley Jay Myers

State of Oregon)
) ss.
County of Multnomah)

I hereby certify that I have prepared the foregoing copy of Appellant's Brief on Appeal; have carefully compared the same with the original thereof, and that it is a correct copy therefrom and of the whole thereof.

DATED; this 14th day of September, 1967.



Of Attorneys for Appellant
Wesley Jay Myers

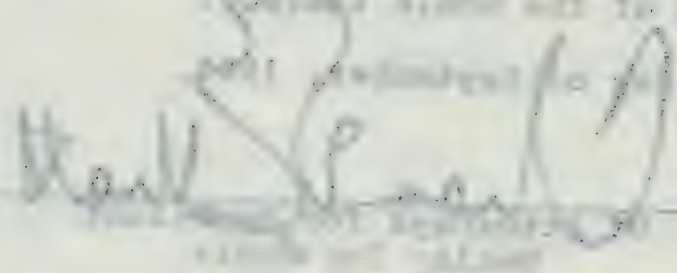
STATE OF OREGON
County of Multnomah

I hereby certify that I have received the following
brief on appeal on behalf of the Multnomah County
Attorney, on the 14th day of September, 1947, at which
to him a true and correct copy thereof, certified by me
as such. I further certify that said copy was placed
in a sealed envelope, addressed to said County Attorney,
Assistant United States Attorney, at 1011 1/2 Street, Suite
Seattle, Washington 98101, for his use and reference and
deposited in the post office at Portland, Oregon on the
14th day of September, 1947, and that said copy thereof was
prepared.

W. J. Smith, Clerk
of Multnomah County
County of Multnomah

STATE OF OREGON
County of Multnomah

I hereby certify that I have received the following
copy of appellant's brief on appeal, as submitted to
said the same with the original thereof, and that it is a
correct copy thereof and of the whole thereof.
DATED this 14th day of September, 1947.


W. J. Smith, Clerk
of Multnomah County
County of Multnomah

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE KENNETH)	
GRASSMAN,)	
)	
Appellants,)	No. 21584
)	
Vs.)	
)	
UNITED STATES OF AMERICA,)	CERTIFICATION
)	
Appellee.)	

I certify that, in connection with the preparation of the brief in the above entitled matter, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Sgd/ Charles V. Elliott
Charles V. Elliott
Of Attorneys for Appellant
Wesley Jay Myers

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

- - - - -

MERVIN CLARENCE HALE,

Appellant, :

v. :

No. 21588 ✓

UNITED STATES OF AMERICA, :

Appellee. :

- - - - -

APPELLEE'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MONTANA, HAVRE-
GLASGOW DIVISION

MOODY BRICKETT
United States Attorney for the
District of Montana

ARTHUR W. AYERS, JR.
Assistant United States Attorney
for the District of Montana

ATTORNEYS FOR APPELLEE

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FILED

JUL 26 1967

JUL 21 1967 WM. B. LUCK CLERK

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
- - - - -

MERVIN CLARENCE HALE,

Appellant, :

v. :

No. 21588

UNITED STATES OF AMERICA, :

Appellee. :

- - - - -

APPELLEE'S BRIEF

JURISDICTION

After waiving prosecution by indictment, an information was filed charging appellant with an assault with a dangerous weapon in violation of 18 U.S.C., Sections 1153 and 113(c). A guilty verdict was returned after trial by jury on April 12, 1966. Notice of appeal was filed by appellant on April 14, 1966.

The jurisdiction of the district court was founded upon 18 U.S.C., Section 3231. Jurisdiction of this Court on appeal is predicated upon 28 U.S.C., Section 1291.

ARGUMENT

Appellant has specified as error two instructions of the lower court and the failure of the lower court to instruct as to a particular matter. Each of the specifications will be dealt with separately below.

Neither of the instructions given nor the omission complained of were objected to as required by Rule 30, Federal Rules of Criminal Procedure. Therefore, appellant, of necessity, relies upon the plain error rule. Rule 52(b), Federal Rules of Criminal Procedure. "Plain error" means "prejudicial error." Herzog v. United States, 226 F.2d 561, 569 (C.A. 9, 1955). Plain error is that which affects substantial rights. Helms v. United States, 340 F.2d 15 (C.A. 5, 1965), cert. denied, 382 U.S. 814. Harmless error must be disregarded. Helton v. United States, 221 F.2d 338 (C.A. 5, 1955). Error which in a close case might call for a reversal may be disregarded as harmless where evidence of guilt is strong. Lutwak v. United States, 344 U.S. 604, 619 (1953); Thomas v. United States, 281 F.2d 132 (C.A. 8, 1960), cert. denied, 364 U.S. 904. The rule is designed to avoid "manifest injustice." Beasley v. United States, 327 F.2d 566 (C.A. 10, 1964), cert. denied, 377 U.S. 944.

In reviewing instructions, they must be considered as a whole.

Beck v. United States, 298 F.2d 622, 634 (C.A. 9, 1962), cert.

denied, 370 U.S. 919.

I.

Appellant's first specification of error attacks one portion of the lower court's instruction on proof of intent. The full instruction may be found at lines 12 - 25 on page 53 and lines 1 - 9 on page 54 of the transcript. This instruction is identical to the one found in Mathes and Devitt, Federal Jury Practice and Instructions, (1965), §10.06. Appellant admits that the first sentence of the portion of the instruction is correct.

Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law * * * assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. (Cramer v. United States, 325 U.S. 1, 31 (1945)).

However, the appellant contends that the second sentence of the portion "created an impression on the jury that the jury must presume the appellant acted with intent to do bodily harm until the presumption is rebutted by evidence of the defense." Appt's Brief at p. 2. (Emphasis supplied). In truth, the second sentence merely rephrases the first and explains the rule therein. There is no requirement that the jury must presume, for the sentence uses the term "may draw the inference." (Emphasis supplied). It is difficult to comprehend appellant's argument that the first

sentence is correct, but that the second sentence constitutes plain error.

Appellant urges upon this Court the holding of the Fifth Circuit in Mann v. United States, 319 F.2d 404 (C.A. 5, 1963), that under the facts extant in that case, such an instruction was erroneous. The Mann case was an income-tax evasion prosecution. In an income-tax evasion case before this Court, the instruction, when considered with the other instructions, was held to be correct. Sherwin v. United States, 320 F.2d 137 (C.A. 9, 1963). Petitions for certiorari in both cases were denied: Sherwin v. United States, 375 U.S. 964, Reh. denied, 376 U.S. 946; United States v. Mann, 375 U.S. 986.

As this Court noted in Sherwin at 149:

Here the language relating to the inference that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted * * * followed an instruction on the question of proving intent by circumstantial evidence; thereafter, following the description of the charges made in the indictment and other instructions on various phases of the case, the court listed the three essential elements which were required to be proved in order to establish the offense charged /including the element of specific intent/.

In the instant case, the instruction on the inference followed an instruction on proving intent by circumstantial evidence (Tr. 53) and was followed itself by an instruction on four essential

elements, including: "Third, that the act was done with the intent to do bodily harm to Martin David DeMarrias." (Tr. 55).

And as in Sherwin, the lower court here instructed that " * * * specific intent must be proved before there can be a conviction." (Tr. 53). Sherwin at 149.

The charge given here is replete with instructions as to proof of intent:

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. (Tr. 52).

With respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction. (Tr. 53).

* * * the burden is upon the prosecution to prove beyond reasonable doubt every essential element /including intent to do bodily harm/. (Tr. 55).

This Court has repeatedly approved instructions which include the one complained of here, when such instructions are considered as a whole. Armstrong v. United States, 327 F.2d 189 (C.A. 9, 1964); Turf Center, Inc. v. United States, 325 F.2d 793 (C.A. 9, 1963); Baker v. United States, 310 F.2d 924 (C.A. 9, 1962), cert. denied, 372 U.S. 954; Legatos v. United States, 222 F.2d 678 (C.A. 9, 1955).

Even the Fifth Circuit has distinguished its own holding in Mann v. United States, supra, where, as here, the inference was predicated upon affirmative acts. Helms v. United States, 340

F.2d 15 (C.A. 5, 1964), cert. denied, 382 U.S. 814; Estes v. United States, 335 F.2d 609 (C.A. 5, 1964), cert. denied, 379 U.S. 964, Reh. denied, 380 U.S. 926.

It is submitted that a review of the transcript amply demonstrates that proof of appellant's guilt was strong and uncontradicted. The jury required no more than fifty minutes to deliberate. (Tr. 61). It is submitted the complained-of instruction cannot in any way be deemed plain error. It is further submitted that even had the instruction been objected to, it would not constitute reversible error.

II.

Appellant contends, in his second specification of error, that the lower court committed plain error in failing "* * * to instruct the jury that it must find the accused not guilty if it believed him innocent or if the government did not prove its case * * *." (Appt's Brief, p. 4).

While a trial judge must admonish the jury of its duty to return a not guilty verdict if upon all the evidence it is not convinced of guilt beyond a reasonable doubt, United States v. Pape, 144 F.2d 778 (C.A. 2, 1944), cert. denied, 323 U.S. 752, the trial judge need not follow a definite ritual using the precise words found in other decisions. United States v. Meisch, 370 F.2d 768 (C.A. 3, 1966).

It is submitted that the lower court more than adequately instructed the jury on this point:

* * * the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case. (Tr. 48).

Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. (Tr. 49).

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply require that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case. (Tr. 50).

Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong * * *. (Tr. 51).

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. (Tr. 52).

* * * the burden is upon the prosecution to prove beyond reasonable doubt every essential element of the crime charged in the information. (Tr. 55).

Appellant contends, in this connection, that the trial court's failure to so instruct gave the jury the impression that the court was of the opinion that the defendant was guilty. This too, is amply refuted by the court's instructions:

This court expresses no opinion whatever about the facts and circumstances of the case. (Tr. 57).

It is proper to add the caution that nothing said in these instructions -- nothing in any form of verdict prepared for your convenience -- is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury. (Tr. 60).

The court in no way so impressed the jury. It did in fact fully instruct the jury on this particular point, although perhaps not in the precise language now deemed appropriate by appellant.

III.

Appellant's third and last specification of error concerns a portion of the lower court's charge that "a mere attack with fists, a fist fight, is no excuse and no justification for the use of a dangerous weapon." (Tr. 57). The defendant has, once again, taken only a portion of an instruction out of context and viewed it in isolation contrary to the rule that the instructions must be viewed as a whole. The entire instruction on this particular point is found at page 57 of the transcript at lines 1 through 23. A reading of Lujan v. United States, 209 F.2d 190 (C.A. 10, 1953), readily shows that this instruction is almost identical, word-for-word, to the one approved there. The Tenth Circuit stated there, commencing at 193:

The Appellant complains of the instructions of the court to the effect that as a rule a mere attack with fists is no excuse or justification for the use of a dangerous weapon. Quoting from 26 Am. Jur. 255 §142, it is said, "An assault with fists may be sufficient under some circumstances to create a belief that it is necessary to kill," and that the instructions of the court had the effect of vitiating his plea of self defense.

Of course, if the challenged statement in the instructions is construed to exclude an assault with fists as justifying the use of a deadly weapon in self defense, the instruction may be subject to criticism on that score.

But the Appellant apparently overlooked the next sentence in the quoted treatise to the effect that a fistic assault is sufficient to create a reasonable belief of the necessity to use a deadly weapon "only in extreme cases, for a blow with the hand can hardly be deemed to warrant a resort to a deadly weapon." Accepting this whole statement as applicable to an assault with a deadly weapon, we think it does no more than support the trial court's explanation that as a rule a mere attack with fists was no excuse or justification for the use of a dangerous weapon.

In any event the statement, considered in its proper context, did not deprive the Appellant of his plea of self defense. The court was at pains to instruct the jury in accordance with ancient and accepted rules that "if a person is assaulted with such fierce force and violence by another that this own life is threatened, or is in great danger of receiving great bodily harm, then he may resort to whatever means may be necessary to repel the assault and to protect himself from great bodily harm, or in the defense of his own life. A person is not required to flee from an assailant, and he may stand his ground and defend himself." The jury was further told, however, that "in order to constitute a legal excuse or justification or justify the use of a dangerous

weapon in protecting one's self, the assault must be so fierce and so violent that the person assaulted, as a reasonable man, actually believes it is necessary to use a dangerous weapon to repel the assault and * * * safeguard his own life." Then followed the statement that "a mere attack with fists, a fist fight, is no excuse and no justification for the use of a dangerous weapon." But the court did not stop there. It went on to tell the jury that it expressed no opinion whatever about the facts and circumstances of the case. That it was for them to determine from the evidence whether the self defense interposed by the defendant in the case was based upon truth and that the use of the deadly weapon was to protect himself as a reasonable man from receiving great bodily harm or in the defense of his life, or whether it was a mere pretext.

The ultimate question whether the fistic assault, if one did in fact occur, justified the use of the deadly weapon, was thus left for the determination of the jury. The court's comment that as a rule a mere attack with fists, or fist fight, was no justification for the use of the dangerous weapon did not deprive the Appellant of his plea of self defense. It merely stated the legal standard by which it should be judged. We think the instructions clearly stated the law and that they were eminently fair to the Appellant's plea under the testimony.

Although appellant's contention "* * * that as a matter of law it cannot be unequivocally stated, as it was here, that a fist fight is no excuse for the use of a dangerous weapon," (Appt's Brief, p. 57), is basically sound, it is apparent that there was no such unequivocal statement here. Rather, the instruction was merely an expanded explanation of the basic rule that --

* * *if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self-defense. (Brown v. United States, 256 U.S. 335, 342 (1921)).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted this 25th day of July, 1967.

MOODY BRICKETT
United States Attorney for the
District of Montana

Arthur W. Ayers, Jr.
ARTHUR W. AYERS, JR.
Assistant United States Attorney
for the District of Montana

ATTORNEYS FOR APPELLEE

Address: Federal Building
Billings, Montana 59103

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arthur W. Ayers, Jr.

ARTHUR W. AYERS, JR.

Assistant United States Attorney
for the District of Montana.

UNITED STATES OF AMERICA)
DISTRICT OF MONTANA.)

: ss A F F I D A V I T

ARTHUR W. AYERS, JR., being first duly sworn, deposes and
says:

That he has this 25th day of July, 1967, deposited three
copies of the foregoing Appellee's Brief in the United States
mails, postage prepaid, to appellant's attorney at the following
last known address:

David G. Ferrari, Esq.
Attorney at Law
777 North First St. Suite 600
San Jose, California

Arthur W. Ayers, Jr.
ARTHUR W. AYERS, JR.

Subscribed and sworn to before me this 25th day of July, 1967.

Clair E. MacLean
Deputy Clerk, U. S. District Court,
District of Montana.

No. 21,591 /

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SAHRAD KERKOKHIAN, JR., etc.,
Appellant,

vs.

B. E. SHIELDS, Trustee of the Estate
of Ronald O. Reichert,
Appellee.

**On Appeal from the United States District Court
for the Eastern District of California**

BRIEF FOR APPELLEE

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No. 21,591

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SAHRAD KERKOKHIAN, JR., etc.,
Appellant,

vs.

B. E. SHIELDS, Trustee of the Estate
of Ronald O. Reichert,
Appellee.

**On Appeal from the United States District Court
for the Eastern District of California**

BRIEF FOR APPELLEE

B. E. Shields, Trustee of the Estate of Ronald O. Reichert, Bankrupt, answers Appellant's brief herein as follows:

PRELIMINARY STATEMENT OF THE CASE

Since both parties to this appeal have been formally designated throughout the proceedings by various captions, Appellee herein proposes for convenience and clarity to refer to himself as "the Trustee" and to Appellant as "United Carpet."

Both parties to this appeal have appeared before the referees below and the District Court, sitting in

bankruptcy, almost continuously since May of 1964. Throughout these proceedings, United Carpet has sought to find some security for its claim against the bankrupt and the bankrupt's estate. It was never successful, and all proceedings finally culminated in the disallowance of United Carpet's claim as a secured creditor and its allowance as an unsecured creditor only, by Order of the Referee on March 15, 1966 (R. 90-92).

Said Order was later confirmed by the District Court, who found after examining all the evidence and hearing all arguments advanced by counsel for both parties, that the same had been rightly determined (R. 174).

STATEMENT OF FACTS

1. Facts occurring prior to the filing of a Creditors' Petition below to have Ronald O. Reichert involuntarily adjudged a bankrupt (January 24, 1964-May 1, 1964).

A. On January 24, 1964, Ronald O. Reichert entered into an agreement with American National Insurance Company, wherein Reichert as "Buyer" agreed to purchase from American National as "Seller" certain real property and leasehold interests in the City of Bakersfield, Kern County, California hereafter referred to as "Bakersfield Inn," and Reichert further agreed to substantially repair, rehabilitate and improve said real property (R. 2-9).

B. Concurrently with the making of said agreement, Reichert agreed to and did assign to American National his undivided one-half interest in a certain promissory note in the principal amount of \$800,000, hereafter referred to as the "Dinkler note," as collateral security for his performance of said repairs and improvements (R. 10-14).

The total principal amount of said note was secured by a second deed of trust on certain Fresno County real property, hereafter referred to as "the Fresno property."

The assignment provided among other things (R. 13) that if Reichert permitted any lien of any kind to be filed against the Bakersfield Inn property and did not remove the same forthwith upon demand, then American National had the right either to apply the accumulated proceeds of said note or as the same might accrue, to pay and satisfy any liens filed against said real property, "and/or" to use said funds to secure performance of Reichert.

C. Reichert, at the same time, further assigned his beneficial interest in said Dinkler note to the Greenfield State Bank of Bakersfield, California, to secure an indebtedness to said bank in the principal amount of \$27,500 (R. 50, lines 10-17).

D. United Carpet, its agents and assigns, furnished and installed certain carpet material in the Bakersfield Inn for Reichert, commencing on or about January 19, 1964, and because of the failure of Reichert to pay them for the same, recorded a

mechanic's lien claim for the same on May 1, 1964 (R. 40).

2. Facts occurring subsequent to the filing of United Carpet's mechanic's lien claim and relating to items of property in which United Carpet has claimed a security interest herein (May 1, 1964-May 3, 1965).

A. A Creditors' Petition to have Reichert involuntarily adjudicated a bankrupt was filed with the District Court on May 1, 1964 (R. 15-19), and he was so adjudicated on July 24, 1964 (R. 33).

B. On July 15, 1964, and prior to Reichert's adjudication as a bankrupt, United Carpet filed a petition for examination of Reichert and others pursuant to Section 21(a) of the Bankruptcy Act, for an order to show cause in re the nature, extent and validity of alleged liens, and for a temporary restraining order, and said order to show cause and restraining order were issued (R. 20-26, 29-32).

C. United Carpet's petition for the 21(a) examination alleged, among other matters, that the second deed of trust on the Fresno property, securing the Dinkler note, and more particularly that portion which was assigned to American National Insurance Company, was so assigned as security for Reichert's agreement to improve the Bakersfield Inn property (See paragraph VIII of said Petition, R. 24-25).

D. Said 21(a) examination was heard by Referee McGugin on July 24, 1964, continued to August 5, 1964, again to September 2, 1964, and finally to Sep-

tember 22, 1964, with attorneys Donald Franson and Vergil Gerard appearing as attorneys at said examination on behalf of United Carpet (R. 36). During the course of the 21(a) examination, Ronald O. Reichert was questioned by Attorney Gerard as to the effect of the assignment of said Dinkler note to American National and whether or not such assignment was meant for the protection of possible mechanic's lien claimants (R. 115). During said 21(a) examination, United Carpet's counsel introduced into evidence as its Exhibit 1, the Agreement dated January 24, 1964, between American National Insurance Company and Reichert (R. 2).

E. On September 8, 1964, the Trustee gave notice of his intention to sell on September 22, 1964, the bankrupt's interest in the Bakersfield Inn real property and certain personal property associated therewith (R. 34-35).

The sale was held before Referee McGugin on September 22, 1964, and the interest of the bankrupt in the personal property was sold for the sum of \$5,000. The bankrupt's interest in said Bakersfield Inn real property and leasehold interests were abandoned (R. 36-38).

F. On October 13, 1964, Referee McGugin issued an order (1) discharging the temporary restraining order issued on July 15, 1964, pursuant to United Carpet's petition for the same; (2) approving the sale of said personal property owned by the bankrupt; and (3) authorizing the Trustee to abandon the Bakersfield Inn property (R. 36-38).

G. On July 2, 1964, United Carpet filed a complaint in the Kern County Superior Court, Action No. 89999, to foreclose its mechanic's lien against the Bakersfield Inn property, naming Ronald O. Reichert and American National Insurance Company, among others, as defendants (R. 76-83).

H. On February 19, 1965, appellant United Carpet filed its creditor's claim in the within bankruptcy matter, claiming to be both an "unsecured and secured creditor." A copy of the claim of mechanic's lien executed by claimant was attached to the bankruptcy claim (R. 39), although United Carpet had notice and knowledge of the abandonment of the property on which it claimed a lien, as the result of the Referee's order of October 13, 1964 (R. 36-38).

I. On March 30, 1965, the Trustee filed his petition for leave to compromise a controversy involving the bankrupt's interest in the Dinkler note, and for authority to sell the same (R. 48-51). The proposed compromise also provided for the payment to American National and Greenfield State Bank for their assigned interests in said note of the sum of \$6,250 each (R. 51, 52).

Notice of the proposed compromise was mailed to all creditors who had filed claims in the within bankrupt's estate (R. 45-47). United Carpet admitted receiving such notice at the time of its mailing (R. 116, lines 26-29).

J. The hearing on petitioner's petition to compromise said bankrupt's interest in said Dinkler note

was heard by Referee McGugin on April 15, 1965, and no creditor appeared to object to the same; thereupon the compromise and sale was confirmed (See Order Confirming Sale, dated May 3, 1965, R. 55, 56).

3. Facts relating to the disallowance of United Carpet's claim as a secured creditor (January 6, 1966-March 15, 1966).

A. On January 6, 1966, the Trustee served on United Carpet and filed below his objections to the allowance of United Carpet's claim, both as a secured and unsecured creditor, and gave as his reasons for objecting to said claim to secured status, "failure to properly identify security, if any, and evaluate the same. Failure to state information sufficient to identify secured status." (R. 74-75)

B. On or about January 10, 1966, United Carpet filed its first amended complaint for labor and materials, dated December 27, 1965, in said Kern County Superior Court action, again seeking to foreclose its mechanic's lien claim on the Bakersfield Inn property and also to seek an imposition of a constructive trust on the interest of the bankrupt, American National Insurance Company, and Greenfield State Bank, in the Dinkler note and the proceeds thereof (R. 57-73). Ronald O. Reichert, his wife, and the Trustee herein were named defendants in said first amended complaint. However, said complaint was not served upon the Trustee herein until on or about March 15, 1966.

C. The hearing on the Trustee's objections to United Carpet's creditor's claim was calendared for

February 3, 1966, and on said date no appearance was made by United Carpet. Because of the default, Referee Franson initially disallowed the claim both as a secured and unsecured claim, but subsequently allowed the same as an unsecured claim and disallowed the same as a secured claim (R. 74) on or about February 17, 1966.

D. On March 7, 1966, United Carpet filed its motion to set aside disallowance of its claim as a secured claim and noticed the motion for a hearing before Referee Franson on March 10, 1966 (R. 88).

E. On March 10, 1966, neither appellant nor its counsel appeared; however, the Referee was advised by telephone of the intention of United Carpet's counsel not to further press its motion to set aside the disallowance as a secured claim unless said counsel personally appeared to argue the same (R. 88, 132). Referee Franson, by order dated March 15, 1966, thereupon disallowed appellant's claim as a secured claim and reaffirmed his order allowing the same as an unsecured claim (R. 90-91).

F. The record is silent as to the exact substance of the telephone communications between counsel for both parties and the Referee prior to and on the March 10 hearing date. However, each counsel has made unsworn references to the same in various briefs and in argument to the District Court (R. 107, 117, 118, 132, 162), and the Referee made certain handwritten notes concerning such communications (R. 88).

The gist of the conversations to which there is no apparent dispute is as follows:

i. All calls were initiated by United Carpet's counsel.

ii. All calls related to the alleged secured status of United Carpet's creditor's claim.

iii. Both counsel argued with each other the merits of United Carpet's claim as a secured creditor (1) based on its mechanic's lien claim; and (2) based on a constructive trust or equitable lien related to the moneys received by the Trustee from the compromise and sale involving the Dinkler note.

iv. The agreed upon disallowance of United Carpet's claim as a secured creditor if its counsel failed to appear and argue his constructive trust or equitable lien theory, and the request of United Carpet's counsel to dismiss his motion to set aside disallowance of its claim as a secured creditor in the event of his failure to appear.

G. On or about March 15, 1966, the Trustee was served with a copy of United Carpet's first amended complaint and summons in said Kern County Superior Court action.

4. Facts relating to the voluntary disqualification of Referee Franson (April 15, 1966-June 21, 1966).

A. On April 15, 1966, the Trustee petitioned the bankruptcy court for an order staying the State Court action and proceedings against him, and for a restraining order (R. 93-98).

B. At the time of the making of the order to show cause and restraining order on April 15, 1966, as requested by the Trustee, Referee Franson apparently disqualified himself from further hearing of all matters between the parties hereto. The only evidence of such voluntary disqualification, however, is found in the order itself which noticed the hearing of the Trustee's petition to stay, before Judge Crocker, sitting in bankruptcy (R. 96-97), and Judge Crocker's handwritten note to United Carpet's counsel on said counsel's letter to Judge Crocker dated June 21, 1966 (R. 158), at which latter time United Carpet's counsel strenuously objected in writing to the disqualification of Referee Franson by himself (R. 155).

5. Facts occurring subsequent to the voluntary disqualification of Referee Franson (May 2, 1966-October 27, 1966).

A. On May 2, 1966, at the time of the hearing by Judge Crocker of the Trustee's petition to stay further proceedings in the State Court, United Carpet filed its petition for permission to sue the Trustee in such State Court (R. 102).

B. On May 2, 1966, oral argument on both the petitions of the Trustee and United Carpet were heard by the District Court below, sitting in bankruptcy (R. 173).

C. Briefs were thereafter submitted by both parties (Trustee's opening brief filed May 12, 1966, R. 103-111; United Carpet's reply brief filed June 10, 1966, R. 112-129; and Trustee's closing brief filed June 15, 1966, R. 148-153).

On June 14, 1966, United Carpet filed a motion to set aside the Referee's order of March 15, 1966 (R. 142-143), a petition requesting an extension of time for review of said order (R. 144-146), and concurrently therewith filed a petition for reclamation (R. 136-141). Although entitled "Second Motion to Set Aside . . ." this was in reality United Carpet's first such motion, as its earlier motion of March 7, 1966, was directed to an earlier order of the Referee dated February 17, 1966, which was reconfirmed by the March 15 order.

On June 21, 1966, counsel for United Carpet forwarded a letter to Judge Crocker, requesting further oral argument on the matter (R. 158). And the Court answered that letter by stating that it would hear any matters that counsel might wish to bring on for hearing, including further oral argument (R. 158).

D. On July 6, 1966, the Trustee filed his answer in opposition to each of the two new petitions and the motion filed by United Carpet on June 14, 1966 (R. 160-167).

E. On June 23, 1966, United Carpet dismissed its first amended complaint in said Kern County Superior Court, both as to the Trustee herein and as to Greenfield State Bank (R. 159).

F. Further, at the same time, United Carpet settled its claims in said Kern County Superior Court action against American National Insurance Company arising out of said Kern County Superior Court action, for some \$16,000 (R. 207).

G. All of the then pending matters between the parties hereto, including hearings on United Carpet's (1) petition for extension of time for review; (2) second motion to set aside disallowance of claim as a secured claim; and (3) petition for reclamation, were argued orally and in detail on September 12, 1966, before the District Court below, sitting in bankruptcy (R. 168).

H. On October 11, 1966, the District Court below made its order denying (1) United Carpet's petition to sue Trustee in State Court; (2) second motion to set aside and for reconsideration; (3) petition for extension of time for review; and (4) petition for reclamation (R. 168-169).

I. On or about October 13, 1966, the Trustee submitted his proposed findings of fact and conclusions of law to the District Court (R. 173-176), and on October 18, 1966, United Carpet objected to the proposed findings and conclusions and requested special findings (R. 177-181).

J. The District Court entered its findings of fact and conclusions of law and amended judgment on October 27, 1966, notice of which was mailed to appellant on October 31, 1966 (R. 173-175; 182-185).

K. United Carpet filed its Notice of Appeal from said findings and conclusions and amended judgment on November 25, 1966 (R. 188-189).

L. The District Court's findings of facts and conclusions of law from which United Carpet appeals are set forth below in haec verba.

Findings of Fact

It Is True That:

1. On June 24, 1966, Respondent, Sahrad Kerkochian, Jr., dba United Carpet Shop, dismissed without prejudice its suit against Petitioner-Trustee in Kern County Superior Court Civil Suit No. 89999.

2. That Respondent-Petitioner, to-wit: Sahrad Kerkochian, Jr., dba United Carpet Shop, had his opportunity to have his day in Court on each and all the matters raised by each of the Petitions and Motions filed herein.

3. That the Referee rightly determined that Respondent Sahrad Kerkochian, Jr. dba United Carpet Shop's claim herein was unsecured.

4. That more than ten (10) days, to-wit: ninety (90) days elapsed between the making of the Referee's said Order of March 15, 1966 and the filing by Respondent of its Motion to Set Aside, to reconsider and extend time for review.

Conclusions of Law

From the foregoing facts, this Court concludes:

1. That the dismissal of Respondent's suit against the Petitioner-Trustee in the Kern County Superior Court civil matter number 89999, makes it unnecessary for this Court to rule on the Petitioner-Trustee's Motion for a permanent injunction and a stay of further proceedings therein.

2. That the Referee's Order of March 15, 1966, has finally and conclusively established the rights of

Respondent-Petitioner as an unsecured creditor only of the above-named bankrupt's estate.

3. That Respondent-Trustee herein, may not collaterally attack the Referee's decision of March 15, 1966 in the State Court.

4. That Respondent is now estopped to claim an equitable lien or constructive trust against the property of the above named bankrupt herein and his Petition for Reclamation should therefore be denied.

From the foregoing Findings of Fact and Conclusions of Law, the Court concludes that Respondent-Petitioner's Petition for extension of time for review, Second Motion to Set Aside disallowance of claim as secured claim and for reconsideration, Petition for Reclamation, and his Petition to sue Trustee in State Court, should all be denied and judgment entered accordingly.

SUMMARY OF ARGUMENT

Appellant indicates that he wants his "day in court." However, he has been granted numerous days in court, received the utmost of judicial consideration, and continues to belabor points that have been hashed and rehashed for a period now of approximately three years.

This appeal in reality poses three major issues for this Court to decide. Briefly they are as follows:

(1) Did the District Court, in considering all the evidence and facts presented by both parties, clearly err in its decision as disclosed by its findings of fact, conclusions of law, and judgment?

Appellant has not directly attacked the District Court's decision, and therefore the answer to such question must necessarily be in the negative. Nevertheless, appellant seeks to avoid the District Court's decision by attacking the Referee's order of March 15, which poses the second question.

(2) Does a Referee's voluntary disqualification of himself from hearing certain contested issues between parties void all his prior orders as between the same parties in the absence of any showing of affirmative error?

(3) The final question posed to the Court would appear to be whether or not a creditor denied a secured status can thereafter secure such status indirectly by a subsequent action based on theories that were or could have been advanced by him in the earlier proceeding wherein he sought to secure such secured status?

The second question above in turn poses two incidental issues, which are:

(a) Is a Referee in Bankruptcy subject to federal statutes which provide for the disqualification of judges and justices under certain circumstances; and

(b) If a Referee is disqualified from acting in any particular case, are his orders or judgments rendered prior to such disqualification void or voidable.

ARGUMENT**I**

THERE IS NO SUBSTANTIAL EVIDENCE OR THEORY ADVANCED BY APPELLANT WHICH WOULD JUSTIFY THIS COURT IN REACHING A CONCLUSION CONTRARY TO THAT OF THE DISTRICT COURT.

United Carpet's appeal is in reality an appeal from the Findings and Judgment of the District Court itself, sitting in bankruptcy, entered on October 27, 1966 (R. 173). Federal Rule 52(a) says in part that,

“In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . .”

The District Court, on May 2, 1966, and on September 12, 1966, examined all of the evidence, reviewed all of the briefs submitted by counsel for both parties, and heard extensive oral argument pertaining to all issues involved between the parties hereto, and after due consideration of the same made its own findings, conclusions and judgment. These findings and judgment decreed in part that the order of the Referee made on March 15, 1966, was properly determined (R. 174), and the District Court thereby adopted and affirmed said order of the Referee.

Further, Rule 52(a) also states that,

“ . . . Findings of Fact shall not be set aside unless clearly erroneous.”

It has also been asserted on many occasions that the Court of Appeals is not at liberty to disturb the

findings of the District Court where there is no substantial evidence or theory which would justify the Court in reaching a conclusion contrary to that of the Judge or Referee.

3 Collier on Bankruptcy (14th Ed.) Sec. 25.30,
p. 973.

However, since the appellant does not and cannot state to this Court that the findings of fact of the District Court are clearly erroneous, United Carpet necessarily seeks to go behind said findings and judgment and attack the Referee's Order of March 15th.

As was said in *Matter of Ernst* (C.C.A. 2d 1939), 107 F.2d 760, 761,

“Concurrent findings of fact by the referee and the judge will ordinarily be accepted on appeal.”

In the instant matter, the findings of the District Court were deduced from established facts and uncontradicted evidence, from which the District Court properly drew its own inferences and conclusions, which were in part the same as the Referee's in his order of March 15, 1966.

Thus appellant has had the benefit of a complete consideration and review of all the facts that were before the Referee and much more, including evidence and argument, by the District Court, and after such consideration the District Court made independent findings and conclusions which were in part the same as the Referee's. Therefore, without more, this appeal should be dismissed.

II

A REFEREE IN BANKRUPTCY IS NOT A JUDGE, BUT MERELY AN OFFICER OF THE COURT OF BANKRUPTCY, AND THEREFORE NOT SUBJECT TO STATUTES PROVIDING FOR THE DISQUALIFICATION OF DISTRICT JUDGES.

8A C.J.S. Bankruptcy, Sec. 268, p. 411 et seq.;
Fish v. East, 114 F.2d 177, 200 (C.C.A. 10);
Ginger v. Cohn, 255 F.2d 99, 100 (C.C.A. 6).

The Tenth Circuit Court stated in *Fish v. East*, supra, at page 200,

“There appears to be no rules either of said district (district court) or in the rules of civil procedure, or in the general orders, relating to the removal or disqualification of referees. A party aggrieved by an order of the referee may file a petition for review.”

Section 39(b) of the Bankruptcy Act sets forth three specific instances where the Referee should disqualify himself. However, even in those three instances it would appear that the act of disqualification is a matter for the Referee or Court's discretion. The reason given for Referee Franson's voluntary disqualification is not one of the three.

Thus, ignoring for the moment the independent decision of the District Court, which should be the real object of United Carpet's appeal, appellant's efforts to have the Referee's order of March 15th declared void solely by reason of the language of 28 U.S.C. 455, should fail, and the cases cited on page 18 of appellant's brief are therefore not in point.

In the instant matter, when it became apparent that the issues between the parties to this appeal were going to become a matter of contested adversary proceedings requiring discretionary rulings by the Referee, the Referee voluntarily disqualified himself because of his former representation as co-counsel for appellant in the 21(a) examination matter, which occurred approximately two years earlier. However, this in no way rendered his orders made prior to such voluntary disqualification void or even voidable.

Further, the Referee's order of March 15th was made with the knowledge, consent and approval of counsel for appellant. In fact, appellant's counsel admits that he advised the Court and adversary counsel on March 10th by telephone that if he did not appear to argue for a ruling that United Carpet was a secured creditor based upon the theory of a constructive trust or equitable lien, that the Court could disallow United Carpet's claim as a secured creditor (R. 118).

The Referee's order of February 17, 1966, finding that United Carpet was an unsecured creditor to the full extent of its claim, has never to this date been attacked by appellant and stands as a final order still uncontested by appellant. Counsel for appellant was at all times aware of the fact that Referee Franson had been his co-counsel in the initial 21(a) examination proceedings, and at no time did appellant ever object to any prior rulings by Referee Franson or attempt to disqualify him for any purpose.

In fact, the Trustee has never moved to disqualify Referee Franson for any reason in the within matter, and as late as June 22, 1966, United Carpet objected to the Referee's act of disqualification (R. 155).

The Referee's disqualification of himself occurred solely by reason of the inherent sense of fairness and impartiality of Referee Franson, which decision was made by the Referee at least a month or more subsequent to his order of March 15.

Therefore, the Trustee submits that ignoring the District Court's findings and judgment completely, nevertheless appellant's attack on the Referee's order of March 15th should fail.

III

IN THE ABSENCE OF SPECIFIC CONSTITUTIONAL OR STATUTORY PROVISION FORBIDDING A DISQUALIFIED JUDGE FROM ACTING, A JUDGMENT RENDERED BY A DISQUALIFIED JUDGE IS VOIDABLE BUT NOT VOID.

49 C.J.S. Sec. 17, p. 42;

30A Am. Jur. Sec. 216, p. 113.

Assuming for the moment that Referee Franson were disqualified to make his order of March 15, 1966, nevertheless unless the disqualification is a matter of statutory or legal prohibition, any orders made prior to such disqualification should only render the order voidable, not void.

In the instant case, appellant for the first time advanced his theory that the Referee's order of March 15th was invalid by reason of the act of disqualification by Referee Franson on October 18, 1966 (See Objections to Findings, R. 177-180). This argument first advanced on October 18, 1966, was some seven months subsequent to the order, and even now appellant has made no motion to void the order of March 15th.

In the interim period, however, appellant has had a review and hearing on the merits before the District Court, which resulted in the reaffirmance of the March 15th order and a denial of any other relief.

Worthy of comment also is the fact that the Referee's order of March 15, 1966, was little more than a ministerial act, for he had previously found that United Carpet was an unsecured creditor, which finding is not contested even at this time by the appellant, and the order of March 15 disallowing the claim of United Carpet as a secured creditor was made with the consent and even pursuant to the request of appellant's counsel.

Even in the situation where the judge is disqualified by law from presiding over a lawsuit, his orders of a ministerial nature not requiring any discretionary action are valid.

30A Am. Jur., Sec. 215, pp. 112, 113.

Thus again, the Referee's order of March 15th should not properly be subject to attack because of the perfunctory nature of such order in the instant case.

IV

APPELLANT FAILED TO SEEK REVIEW OF THE REFEREE'S
ORDER OF MARCH 15 AS REQUIRED BY SECTION 39(c) OF
THE BANKRUPTCY ACT.

As stated in 2 Collier on Bankruptcy, paragraph 39.16, page 477,

“Subdivision c was added to Section 39 of the 1938 Act for the purpose of clearly outlining the procedure to be followed in obtaining a review of a Referee's order and in the interest of certainty and uniformity.”

Section 39(c) expressly limits the time in which a petition for extension of time to file a petition for review and a petition for review can be made. The time limitation is ten days following the entry of the order or to such time to which the Referee extends the time, provided a request for extension is made within said ten-day period.

In the instant case, United Carpet's petitions for such were not filed until ninety days after the making and entry of the Referee's order. It was not then within the discretion of either the Referee or the District Court to grant such right of extension.

Further, the prevailing view seems to be that while a Referee may reconsider *allowed* claims at any time before the estate is closed, a creditor is not entitled to such reconsideration if his claim is disallowed in whole or in part. In such a case an aggrieved creditor must petition for review within the time as stipulated in Section 39(c) and according to the procedure outlined therein.

2 Collier, Par. 39.17, pp. 1481, 1482.

The District Court, although properly holding that appellant's motions to set aside, reconsider, and extend time for review, were untimely filed and therefore denied, nevertheless did give appellant a full-scale hearing and consideration of all issues involved in the March 15 order.

Appellant's petition for reclamation is in fact an attempt to collaterally circumvent the order of March 15th which disallowed him his requested secured creditor status.

V

IT IS A WELL SETTLED PRINCIPLE THAT RES JUDICATA MAY BE PLEADED AS A BAR, NOT ONLY AS RESPECTS MATTERS ACTUALLY PRESENTED TO SUSTAIN OR DEFEAT THE RIGHT ASSERTED IN THE EARLIER PROCEEDINGS, BUT ALSO AS RESPECTS ANY OTHER AVAILABLE MATTER WHICH MIGHT HAVE BEEN PRESENTED TO THAT END.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 378.

The Supreme Court in the *Chicot County* case, *supra*, 308 U. S. 371, 378, stated:

“The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain

or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' ”

In the most recent edition of Collier on Bankruptcy, it is stated:

“... it is safe to deduce from the Act that it contemplates a choice to be made by a secured creditor between the following three possibilities: (1) to prove his claim as an unsecured claim and surrender his security; or (2) to prove his claim as a secured claim and give the bankrupt credit for the value of the security; or (3) not to prove at all and rely solely on the security.”

3 Collier, 14th Ed., par. 57.07, n. 19, p. 158.

United Carpet, by the filing of its creditor's claim on February 19, 1965, chose to seek the status of both a secured and an unsecured creditor (R. 39). Therefore, United Carpet was required by Section 57(a) of the Bankruptcy Act to specifically identify and disclose in his proof of claim any security which he held.

The claim itself mentioned United Carpet's mechanic's lien claim, but at that time United Carpet was well aware of the abandonment by the Trustee of the real property in question as the result of the Referee's order of October 13, 1964 (R. 173).

Furthermore, at the time of the filing of its creditor's claim, United Carpet had been aware of the assignment of the Dinkler note to American National since the 21(a) examination in July of 1964.

Still further, United Carpet had set forth its claim to an equitable lien by way of a constructive trust on the moneys derived by the Trustee from the compromise and sale of the bankrupt's interest in the Dinkler note in its first amended complaint filed in the Kern County Superior Court action, which complaint was dated December 27, 1965 (R. 64-72).

Additionally, United Carpet's counsel discussed the equitable lien theory as a basis for United Carpet's secured creditor status prior to the making of the March 15th order (R. 118). And yet, not until June 14, 1966, some ninety days after the March 15th order, did United Carpet ever advance its claim to the equitable lien.

Thus, pursuant to the principles set forth in the *Chicot County* case by the Supreme Court, supra, 308 U.S. 371, and pursuant to the provisions of Section 57(a) of the Bankruptcy Act, the March 15th order is res judicata as to the issues formed in the petition for reclamation and should preclude and estop appellant from further hindering or delaying the closing of the bankrupt estate and distribution to the general creditors, of which appellant is one.

CONCLUSION

The appellee admires the tenacity of the appellant, but abhors the unconscionable delays occasioned by the same, which without merit have caused undue prejudice and extreme hardship to all other general creditors of the bankrupt.

Appellant has had the advantage of a full-scale hearing on the merits, liberal review and reconsideration of the Referee's orders, and should not now be permitted to seek the secured status denied him seventeen months ago.

The Trustee opines that the District Court's findings, conclusions, and judgment of October 27, 1966, should be affirmed by this Court and appellant's appeal dismissed.

Dated, Bakersfield, California,
August 14, 1967.

Respectfully submitted,
S. B. GILL,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S. B. GILL,
Attorney.

**United States Court of Appeals
For the Ninth Circuit**

RICHARD L. DEHART and PHOEBE D. DEHART, his
wife, d/b/a DEHART OIL COMPANY, *Appellants*,

vs.

RICHFIELD OIL CORPORATION, a corporation, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANTS

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United States Court of Appeals
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RICHARD L. DEHART and PHOEBE D.
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COMPANY, *Appellants,*

vs.

RICHFIELD OIL CORPORATION, a corpora-
tion, *Appellee.*

No. 21597

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the District Court pursuant to Title 28, United States Code, Section 1332, diversity of citizenship and jurisdictional amount. Plaintiffs are citizens of the State of Washington, and defendant is a corporation incorporated under the laws of Delaware. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs. (Tr. 6).

Jurisdiction of the Court of Appeals is conferred by Title 28, United States Code, Section 1291, Final

decisions of District Courts. A final decision was entered in this case by the District Court, November 23, 1966. (Tr. 78).

STATEMENT OF THE CASE

The Appellants entered into an agreement with Appellee on or about February, 1956, to, among other things, distribute at wholesale, appellee's gasoline and petroleum products. Appellee was to provide gasoline under terms and conditions set in part by market prices. The breach of that agreement by the Appellee is the subject of the lawsuit now being appealed. This lawsuit was commenced December 20, 1965, in the Superior Court of Snohomish County of the State of Washington. Defendant petitioned for removal to the United States District Court on December 30, 1965.

The case at bar came on for Summary Judgment only after extensive pre-trial activity. Significantly, plaintiffs' discovery efforts were thwarted at every point by the Court's decisions on their motion to produce and defendants objections to plaintiffs' interrogatories. On the other hand, defendant's discovery proceeded unmolested. These decisions were but a prelude to the Summary Judgment granted defendant on November 8, 1966, on its contention that no genuine issues of material facts existed because the prior action, No. 5145 constituted collateral estoppel.

The prior lawsuit, No. 5145, instituted on or about October, 1960, by the DeHarts and their four incorporated retail gasoline stations against Richfield Oil Corporation and naming numerous co-conspirators, alleged violations of certain Federal Anti-trust

laws and claimed damages thereby. That action, Civil Action No. 5145 in the United States District Court for the Western District of Washington, Northern Division, was also decided by Judge William T. Beeks.

A separate trial was had in No. 5145 on defendant's cross-complaint for enforcement of a "Memorandum of Settlement Agreement" signed by defendant and the then attorney for the plaintiffs. The sole issue before that court was to determine whether the attorney had authority "to compromise the claims set forth in that complaint" and to execute the "Settlement." The Court in its "Findings of Fact," No. 3 (Tr. 35) found that he was authorized to that extent and entered its Judgment November 30, 1964, dismissing the Complaint and ordering the plaintiffs to execute the necessary documents to carry out the terms of the "Settlement." An appeal was not taken not because it lacked merit but because the DeHarts were almost destitute and without counsel. (Tr. 367).

SPECIFICATIONS OF ERRORS

THE COURT ERRED:

1) In granting Summary Judgment in favor of defendant and Judgment of Dismissal.

2) In granting defendant's Motion to Strike Plaintiffs' Jury Demand.

3) In sustaining Objections of Defendant to Plaintiffs' Interrogatories and denying plaintiffs' Motion for Production of Documents.

STATEMENT OF APPELLANTS' POINTS ON APPEAL

1) The District Court erroneously considered United States District Court for the Western Division of Washington, Northern Division, Civil Action No. 5145 as collateral estoppel on all fact issues present in this case.

2) Plaintiffs did not surrender all causes of action against defendant when the "Settlement" was executed.

3) A cause of action based on breach of contract is not surrendered when a cause of action based on Federal Anti-Trust violations is surrendered.

4) The intention of the parties to a "Settlement" may be shown by the "Settlement" itself and parol evidence explaining the "Settlement." The latter is an issue of fact which precludes Summary Judgment.

5) An agent's authority to settle all claims of his principal is not adjudicated by a judgment finding he was authorized to settle one particular lawsuit.

6) The District Court's Order Granting Objections of Defendant to Plaintiffs' Interrogatories and Denying Plaintiffs' Interrogatories and Denying Plaintiffs' Motion for Production of Documents prejudiced Plaintiffs' ability to contest Defendant's Motion for Summary Judgment.

7) Plaintiffs' First Jury Demand should have been honored by the Court under the facts alleged in Plaintiffs' uncontroverted affidavit.

8) The District Court's Order denying Plaintiffs' discovery was erroneous since discovery was directed at the issues of the case.

ARGUMENT

I. Summary Judgment By the District Court Was Erroneous

The principal question on appeal is whether Summary Judgment was erroneously granted the defendant, Richfield Oil Corporation by the District Court. Appellants contend that Summary Judgment was erroneously granted for three principal reasons:

1) Genuine issues as to material facts exist precluding Summary Judgment;

2) A prior judgment deciding only one point involved in the present case does not constitute collateral estoppel as to all fact issues presented in this case.

3) The District Court's order overruling plaintiffs' discovery efforts was in error and prejudiced plaintiffs' ability to contest defendant's Motion for Summary Judgment.

Before discussing the merits of the appeal, it is well to reiterate some points regarding Summary Judgment under Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A. Appellants are entitled to have the pleadings, depositions, affidavits, etc., and the facts they contain, examined in the light most favorable to them. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 7 L. ed.2d 458, 82 Sup. Ct. 486 (1962). The *Poller* case also points out that Summary

Judgment should be used sparingly where motive and intent play leading roles.

The fact that other lawsuits have been brought between the parties does not by itself mean Summary Judgment is appropriate. In *Arnstein v. Porter*, 154, F.2d 464 (C.C.A.2d 1946), the Court of Appeals, in reversing a summary judgment, said,

“[a]bsent the factors which make up *res judicata* (not present here), each case must stand on its own bottom, . . . Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray.” [p. 475].

The *Arnstein* case closely parallels the instant case in fact and law. It should be apparent that previous litigation and extended pre-trial efforts are not determinative merely because the defendant is vexed.

1. Genuine Issues As To Material Facts Exist Precluding Summary Judgment

Summary Judgment was granted defendant on the basis of a “Memorandum of Settlement Agreement” which was held enforceable in United States District Court, Western District of Washington, Northern Division, Civil action No. 5145. In Appellee’s own words, that judgment “was concerned solely with the question of the enforceability of the Memorandum of Settlement executed by attorneys for the parties.” (Tr. 119). This is further limited by the District Court’s Findings of Fact,” No. 3 in No. 5145:

“3. Plaintiffs, and each of them, instructed and authorized Dwyer to compromise the claims set forth in the complaint herein on the terms con-

tained in the "Memorandum of Settlement Agreement." (Defendant's Exhibit A) and to execute said agreement on plaintiffs' behalf." (Tr. 277 — emphasis added).

An examination of the "Memorandum of Settlement Agreement" confirms the correctness of the District Court's "Finding of Fact" No. 3. The "Settlement" was intended to resolve the three lawsuits specifically enumerated therein. There is no evidence whatsoever that the then attorney for plaintiffs was authorized to settle all of plaintiffs' claims without limitation. The only point adjudicated was the attorney's authority to settle the particular lawsuits. Not yet adjudicated is the prior attorney's authority to settle claims other than those involved in the lawsuit which he was retained to prosecute and the intention of the parties when they signed the settlement. It is plaintiffs' contention that upon trial of these fact issues it will be proved that they did not surrender their cause of action based on breach of contract.

This case is similar to *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (C.C.A. 2nd 1946) where Judge Learned Hand passed upon the extent of an attorney's authority to compromise a claim and a jury's determination that the attorney's authority had been limited. Circuit Judge Swan, dissenting, makes clear his view that the cause should be "remanded for a new trial in which the issue of what claims the attorney was authorized to settle shall be clearly submitted to the jury" (*Supra*, p. 770). It should be undeniable that where the extent of a agent's authority is in issue, a genuine issue as to a material fact exists precluding summary judgment.

The question of the intentions of the parties to a contract may not properly be resolved on a motion for summary judgment. *Empire Electronics Co. v. United States*, 311 F.2d 175 (C.C.A. 2nd 1962); *Baxter v. Lance Industries, Inc.*, 213 F. Supp. 92 (1963). The case at bar has no interpretation of the "settlement," except that for purposes of civil action No. 5145 the agent was authorized to sign it. The scope of the settlement is not a question of law but a question of fact based on the intentions of the parties who signed it. The adequacy of the consideration given for the "settlement" is also unresolved.

The standard to be applied is to:

"view the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn. 'If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.' *Ramsouer v. Midland Valley R. Co.*, 135 F.2d 101, 106 (C.C.A. 8th 1943). This admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions." *Empire Electronics Co. v. United States*, *supra*. p. 180.

For the reasons given above, substantial issues of material fact exist precluding Summary Judgment. Summary Judgment by the District Court was erroneously granted.

2. Prior Litigation Does Not Constitute Collateral Estoppel

The doctrine of collateral estoppel precludes re-litigation of previously decided issues, as between the identical parties, in a subsequent action based on a different cause of action. It is submitted that the prior action, No. 5145, decided but one issue relevant to this lawsuit which is that the agent involved had authority to settle the claims involved in that lawsuit. That prior suit is *res judicata* only as to that issue. *Baxter v. Central West Casualty Co.*, 186 Wash. 459, 58 P.2d 835 (1936); Restatement, Judgments (1942) § 68; 30A Am. Jur. Judgments, § 373.

A. Different Fact Issues Are Presented.

The proponent of a motion for Summary Judgment has the burden of proving that no genuine issues as to material facts exist. *Rankin v. King*, (C.C.A. 9th 1959) 272 F.2d 254. Here, the purported proof is the Findings of Fact entered in No. 5145. Numerous questions of fact remain unadjudicated including the sufficiency of the purported consideration; if, as Appellee contended, Appellants surrendered all their claims. It has already been shown that that judgment was based on one narrow question of fact. It does not work *res judicata* unless this cause of action was merged in that judgment.

B. Difference Causes of Action Are Asserted.

The present action is based on a breach of contract. The prior suit which is asserted as *res judicata* was based on violation of the Federal Anti-trust Laws. It is difficult to imagine that a claim for breach of contract would be barred by a judgment in an anti-

trust suit. Rather, Appellee is pressed to contend that by the "settlement" Appellants relinquished all claims against Appellee. This has not been adjudicated.

Under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 83 L. Ed. 1118, federal courts must look to state law for answers to substantive questions. Washington law on res judicata is summarized in *Symington v. Hudson*, 40 Wn.2d 331, 243 P.2d 484. The concurrence of four items is necessary to make a prior judgment res judicata in a subsequent action. They are: (1) identity of subject matter; (2) identity of cause of action; (3) identity of persons and parties; and (4) identity in the quality of the persons for or against whom the claim is made. The absence of any one of these items invalidates the assertion of res judicata.

The subject matter of Civil Action No. 5145, was, among other things, the alleged ruthless conspiracy by Appellee and the named co-conspirators to deprive the plaintiffs in that lawsuit of a source of gasoline. The cause of action was based on a statutory right of action. The case at bar is founded upon a breach of contract under which the Appellant was obligated to, among other things, supply Appellant with gasoline and financing under specified terms and conditions. Some of the terms were keyed to market prices. The dissimilarity of the two cases is obvious. Res judicata is inapplicable to the case at bar. It is submitted that as a matter of law, summary judgment was erroneous.

3. The District Court's Order Granting Objection of Defendant To Plaintiff's Interrogatories And Denying Plaintiff's Motion For Production Of Documents was in error and prejudiced Plaintiffs' ability to contest Defendant's Motion For Summary Judgment.

The District Court made a sweeping order October 18, 1966, which denied all of Appellants' discovery motions (Tr. 318). On October 25, 1966, defendant filed its Motion for Summary Judgment which was granted November 23, 1966 (Tr. 382). It is submitted that the denial of Appellants' discovery motions was in error and seriously prejudiced their ability to oppose the motion for Summary Judgment. Further, the denial of those motions indicates that the District Court was predisposed as to the facts such discovery would elicit.

Appellants ought to have been permitted discovery as requested in their motions (Tr. 182 and 300). A review of the interrogatories indicates they were designed to discover information relevant to the terms and conditions of the contract which is the subject of this suit, the meaning of certain defenses raised by defendant and facts concerning the settlement. This is documented by "Plaintiffs' Brief on Defendant's Objections to Interrogatories" (Tr. 301).

A comparison of the interrogatories which plaintiffs were required to answer and those which defendant was not required to answer reveals some inconsistencies in rulings by the District Court. For instance, defendant was permitted to ask,

"5. Do you contend that the Judgment and Decree in that certain action . . . being Civil Action No. 5145 . . . is void or voidable?" (Tr. 79, 80).

but plaintiffs were not permitted to ask,

“23. In what respects are the plaintiffs ‘duty bound’ by the Judgment and Decree in Cause No. 5145 before this Court,” (Tr. 187).

Many of plaintiffs’ interrogatories were directed to the status of the “Settlement” adjudicated in No. 5145. Defendant successfully asserted they were irrelevant to any issues in this case despite the fact that its principal defense was grounded on the scope and strength of the “Settlement” (Tr. 222-228).

Because discovery was denied, Appellants were not able to contest Appellee’s affidavits in support of Support of Summary Judgment. Appellants, by their affidavit, stated their beliefs about what they expected discovery to reveal. Summary judgment should not be granted where the party against whom it operates has not had the opportunity to prepare by discovery to meet the issues raised thereby. *Hathaway Motors v. General Motors Corporation*, 19 F.R.D. 359 (1955).

**II. THE DISTRICT COURT’S “ORDER GRANTING
MOTION TO STRIKE JURY DEMAND” AND
“ORDER DENYING PLAINTIFFS’ MOTION TO
AMEND COMPLAINT, GRANTING DEFENDANT’S
MOTION TO STRIKE PLAINTIFFS’ SECOND
DEMAND FOR JURY, SUSTAINING OBJECTIONS
OF DEFENDANT TO PLAINTIFFS’
INTERROGATORIES AND DENYING PLAINTIFFS’
MOTION FOR PRODUCTION OF DOCUMENTS”
WAS ERRONEOUS.**

Assuming the Court’s concurrence with Appellants’ position that Summary Judgment was improperly

granted, the Court is asked to overrule two orders which were not appealable until a final Judgment was entered.

1. Plaintiffs' First Jury Demand Should Have Been Granted By the Court.

Under Federal Rules of Civil Procedure Rule 38(d), 28 U.S.C.A., Appellants had waived their right to a trial by jury in this case. However, the trial court has discretion to relax the time requirement where special circumstances are shown to exist. 2B *Federal Practice and Procedure* § 892, Barron and Holtzoff (1961). It is submitted that special circumstances justifying the exercise of such discretion were present and that the Court abused its discretion by not permitting plaintiffs' jury demand to stand. *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447 (C.C.A. 9th 1960).

Plaintiffs filed this jury demand on January 28, 1966 (Tr. 44). Defendant filed its "Motion to Strike Demand for Jury" on February 17, 1966 (Tr. 53). The special circumstances which require the exercise of the Court's discretion in this case is the uncontroverted affidavit of James M. Healey filed May 12, 1966 (Tr. 115). In the affidavit counsel for Appellants relates his understanding with counsel for Appellee that, "all proceedings, either by the plaintiffs or the defendant were stayed by agreement until after the plaintiffs' petition for removal could be heard" (Tr. 115). It is submitted that an uncontroverted misunderstanding between counsel should be reason enough for the exercise of the Court's discretion on this matter. *Arnold v. Trans-America Freight Lines*, 1 F.R.D. 380 (1940).

2. Defendant's Objection to Plaintiffs' Interrogatories should have been overruled and Plaintiffs' Motion for Production of Documents should have been granted.

Under "I Summary Judgment by the District Court was Erroneous," No. 3 of this brief (Brief p. 11), Appellants have elaborated their reasons why they were prejudiced in preparing to meet the motion for summary judgment by the court's rulings which denied them discovery. For the same reasons, the rulings prejudice Appellants' ability to prepare for trial. It is possible for the court to reverse the Summary Judgment without ruling that the Order Denying Plaintiffs' Discovery Motions was improper. For this reason, Appellants specifically assign as error, the District Court's "Order Denying Plaintiffs' Motion To Amend Complaint, Granting Defendant's Motion To Strike Plaintiffs' Second Demand For Jury, Sustaining Objections Of Defendant to Plaintiffs' Interrogatories And Denying Plaintiffs' Motion For Production of Documents" (Tr. 318).

III. CONCLUSION

Appellants have shown that the District Court's Order Granting Defendant Summary Judgment was erroneous because genuine issues of material facts exist and because, as a matter of law, the prior action, No. 5145, does not represent *res judicata* nor collateral estoppel except as the one issue decided by the adjudication. Summary Judgment was improper for the additional reason that the court's order denying them discovery was erroneous and prejudiced their ability to show that genuine issues as to material facts existed.

Assuming the court reverses the Summary Judgment, it is then asked to reverse two orders entered by the District Court. The first order assigned as in error is the District Court's failure to allow plaintiffs' jury demand to stand. The lower court abused its discretion by not giving credence to the uncontroverted understanding between counsel. The second order wrongfully cut off all of Appellants' discovery efforts leaving them without the means to effectively prepare for trial.

Based on the foregoing, Appellants respectfully request the Court to reverse the Summary Judgment and remand the case for jury trial with complete discovery as permitted under the rules.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with the rules.

Kenneth R. Long

No. 21597
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

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DEHART, his wife, d/b/a
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Appellants,

vs.

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a corporation,

Appellee.

On Appeal From The Judgment Of The United States
District Court For The Western District Of
Washington, Northern Division
The Honorable William T. Beeks, Judge

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No. 21597

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD L. DEHART and PHOEBE D.

DEHART, his wife, d/b/a

DE HART OIL COMPANY,

Appellants,

vs.

RICHFIELD OIL CORPORATION,

a corporation,

Appellee.

On Appeal From The Judgment Of The United States
District Court For The Western District Of
Washington, Northern Division
The Honorable William T. Beeks, Judge

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The jurisdictional statement in appellants' opening brief is correct, except that the district court's final decision appears on page 382 of the transcript of record, not page 78. Diversity of citizenship jurisdiction more fully appears from the petition for removal and the answer herein. (Tr. 1-3, 18-19.)

STATEMENT OF THE CASE

Appellants' statement of the case is misleading. It fails to state the dispositive question involved on this appeal, and indeed the point is not intelligibly presented at any place in appellants' brief.

This action for breach of contract was filed by Richard L. DeHart and Phoebe D. DeHart on December 20, 1965 in the Superior Court of the State of Washington in and for the County of Snohomish. (Tr. 6.) The suit was thereafter removed to the United States District Court for the Western District of Washington by petition of defendant-appellee Richfield Oil Corporation (hereafter "Richfield") upon the ground of diversity of citizenship. (Tr. 1.) Richfield filed its answer on January 7, 1966. (Tr. 18.) Appellants (hereafter "the DeHarts") were subsequently granted leave to amend their complaint (Tr. 237), and did so by the filing of an amended complaint on September 15, 1966.* (Tr. 241.) The amended complaint was answered on September 26, 1966. (Tr. 261.)

Among the defenses raised in Richfield's answer is the contention that the claims alleged by the DeHarts were discharged and extinguished in a written release of all claims executed by them in connection with settlement of a prior lawsuit between the parties. (Tr. 21-25; 264-68.) A motion for summary judgment was made on the ground that there exists no genuine issue for trial as to any material fact relating to this affirmative defense. (Tr. 320.) The district court held that the release signed by the DeHarts had discharged and extinguished the claims

* This amendment, solely to add an additional element of alleged damage, was occasioned by the district court's dismissal of a virtually identical case which appellants filed in the state court following removal of the present action. The latter-filed case was an obvious attempt to thwart the district court's diversity jurisdiction through the device of naming as defendant "Rocket Oil Company," a non-incorporated division of Richfield, and alleging that non-entity to be a citizen of the State of Washington. Richfield appeared and successfully removed the case, which became Action No. 6703 on the files of the district court for the Western District of Washington. An appeal was taken from the subsequent dismissal of that action (No. 21596), but it has evidently been abandoned.

set forth in their amended complaint and that appellants had failed to raise any genuine factual issue with respect to the applicability or validity of the release. Summary judgment accordingly was granted. (Tr. 382.) The primary and dispositive question presented by this appeal is whether that ruling by the court below was correct.

SUMMARY OF ARGUMENT

In the argument which follows it will be shown that the written release of all claims concededly executed by the DeHarts is unambiguous and on its face clearly applies to and has extinguished the claims sought to be set forth in this action. Appellants have alleged no specific facts which, if true, might tend to support a finding that the release is invalid or void. The arguments which they make in this respect, all raised for the first time in this court, are stated in terms of legal conclusions, not facts, and are patently without merit. The DeHarts' principal contention — that they did not authorize the prior settlement agreement providing for release and discharge of all claims — has been put at issue and actually litigated in a previous suit between the parties. The court in that action expressly found to the contrary. Its judgment has long since become final and is conclusive on the point. As a matter of law therefore, on the undisputed record, Richfield was entitled to summary judgment.

Appellants' other specifications of error will next be considered. It will be pointed out that objections to appellants' interrogatories were properly sustained and that their motion for production of documents was properly denied. In any event, these rulings had no bearing on appellants' ability to respond to the motion for summary judgment. Finally, although the point need not be considered by this Court, it will be shown that Richfield's

motion to strike plaintiffs' jury demand was well-taken and necessarily granted.

ARGUMENT

I.

THERE ARE NO TRIABLE ISSUES OF FACT IN THIS CASE AND SUMMARY JUDGMENT WAS THEREFORE PROPERLY GRANTED.

A. Background: The Prior Litigation.

The following facts form the basis of the ruling below. They appear from the pleadings and other papers on file in the district court and from the affidavits filed in support of the motion for summary judgment. Not one of these facts has been contested by appellants.

On October 5, 1960, appellants herein, Richard and Phoebe DeHart, together with certain corporations wholly owned by them, commenced an action in the United States District Court for the Western District of Washington against Richfield Oil Corporation, appellee herein, alleging violations of the federal antitrust laws (Civil Action No. 5145). On March 10, 1964, after completion of extended discovery and other proceedings in that action, plaintiffs and defendant, through their counsel of record, entered into a written "Memorandum of Settlement Agreement." (Tr. 27, 269.) The settlement agreement was made "in full settlement of all claims" held by plaintiffs against Richfield and vice versa, and provided, among other things, for a substantial reduction of the DeHarts' then indebtedness to Richfield and for dismissal with prejudice by Richfield of actions then pending to collect sums owing by the DeHarts for past purchases of petroleum products and to foreclose under a mortgage it held as mortgagee on plaintiffs' property. (Tr. 358-60.) The agreement further provided for dis-

missal with prejudice by plaintiffs of Action No. 5145 and for the execution of mutual releases of all claims the parties may have had against each other.

Plaintiffs subsequently refused to render the performance required of them under the settlement agreement and as a result Richfield filed a cross-complaint in Action No. 5145 seeking enforcement of the agreement. (Tr. 73, 166.) As appears from the record of that case, plaintiffs defended on the ground that they had not authorized or ratified the settlement agreement in that it departed in certain respects from their instructions to their then attorney of record. (See Pretrial Order, printed in Appendix A hereto.)

The cross-complaint came on for separate trial on November 18, 1964 before the Honorable William T. Beeks. Following the introduction of evidence and argument and submission of the cause, the court found that the DeHarts had instructed and authorized their attorney of record to compromise their claims against Richfield on the terms contained in the settlement agreement and to execute the agreement on their behalf. The court further found that the DeHarts had ratified and confirmed the settlement agreement subsequent to its execution. It was therefore adjudged that the agreement was binding upon the parties and should be enforced by a decree of specific performance, and that the previous case, Civil Action No. 5145, should be dismissed with prejudice. (Tr. 33-36, 275-78.) The court's judgment and decree to this effect was made and entered in said prior action on November 30, 1964. (Tr. 37-39, 279-81.) In the decree the DeHarts were directed to execute all documents required to be executed by them under the terms of the settlement agreement. They did execute the documents, and the settlement was finally concluded in January 1965. (Tr. 334-60.) Plaintiffs took no appeal from the denial

of their motion for a new trial or from the court's judgment and decree, and the same accordingly have long since become final. (Tr. 75-76, 166.)

One of the documents signed by the DeHarts in connection with the settlement was a Release of All Claims (Tr. 344-46), and that release is the basis of the summary judgment in this case. In the release "Richard L. DeHart and Phoebe B. DeHart, individually, and doing business as DeHart Oil Company" acknowledged full and complete satisfaction of and released and discharged Richfield Oil Corporation "from any and all claims, demands and causes of action of whatever kind or nature, whether known or unknown, or suspected or unsuspected" which plaintiffs then or at any time prior thereto owned or held against Richfield. (Tr. 344.)

B. There is No Genuine Fact Issue as to The Applicability or Validity of the Release and as a Matter of Law the Conclusion Follows That The Obligations Sought to be Enforced in this Action Were Extinguished by It.

The release was executed by the DeHarts on December 18, 1964. (Tr. 345.) Their Richfield distributorship commenced by agreement with appellee almost nine years previously, in early 1956. (Tr. 242, 263.) The distributorship was terminated by mutual agreement on or about October 15, 1960, shortly after filing of the antitrust suit, Action No. 5145, and Richfield has had no subsequent business dealings with the DeHarts. (Tr. 263, 351-52.) Appellants' amended complaint in the present action is concerned solely with promises purportedly made by Richfield to the DeHarts in connection with their distributorship and alleged breaches thereof during this period. (Tr. 241.) Indeed, it is quite plainly an effort to state under a new legal theory essentially the same grievances

as were involved in the earlier case. It follows therefore that the claims asserted in the present action accrued long before the DeHarts signed the release, and were discharged by that release unless it is inapplicable or unenforceable.

There is no genuine issue as to any material fact affecting either the applicability or enforceability of the release. Prior to filing its motion for summary judgment, Richfield sought to ascertain the DeHarts' position in this respect with a set of interrogatories directed to the issue. The DeHarts were asked to state whether they contended the release was inapplicable or invalid, and, if so, to specify the grounds upon which the contention was based and to state in reasonable detail all facts which plaintiffs intended to prove at the trial in support of any such contentions. (Tr. 77.) In their answers to these interrogatories (Tr. 173) the DeHarts did contend that the release was invalid, on the following grounds: "duress, coercion, lack of consideration and that it is inequitable to plaintiffs herein." (Tr. 174.) However, no facts in support of this contention were set forth in the answers to interrogatories. Instead, various conclusions and legal arguments were advanced based upon aspects of the prior proceedings. (Tr. 175-78.) In substance, these were the points urged subsequently in opposition to Richfield's motion for summary judgment. (Tr. 364.) The opposing affidavit of appellants, however, like the answers to interrogatories, did not set forth any pertinent specific facts showing a genuine issue for trial, but rather consisted solely of hearsay assertions and conclusions. (Tr. 366.) This brief does not consider the contentions asserted by appellants in the court below, since they are not advanced in support of the present appeal. These points are discussed fully in a trial memorandum of appellee which is included in the transcript of record. (Tr. 327-30.)

In their opening brief, appellants rely on three previously unmentioned alleged issues of material fact which are said to preclude summary judgment. As a matter of law, none of these purported fact issues is a genuine issue. In addition, appellants' unexplained failure to raise them in the trial court serves as an independent ground for affirmance. *Ring Engineering Co. v. Otis Elevator Co.*, 179 F.2d 812 (D.C. Cir. 1950).

1. The Alleged Issue of Authority

Appellants now assert, first, that there exists a fact issue with respect to the authority of the DeHarts' attorney in the prior action, Civil Action No. 5145, to settle claims other than those specifically involved in lawsuits then pending. (App. Op. Br. 6-7.) As a matter of law, however, that point is resolved against appellants by facts which are undisputed and incontrovertible. The same question was squarely presented for trial and was actually litigated in the previous case. The Pretrial Order therein, printed in Appendix A hereto,* states, in part (p. 3): "The only issue of fact to be determined by the court is whether or not the execution of the "MEMORANDUM OF SETTLEMENT AGREEMENT" of March 10, 1964 was authorized or ratified by plaintiffs."

After trial on this issue, the district court expressly found that the DeHarts had authorized and ratified a settlement of the case "on the terms contained in the

* Since no issue was raised below by the DeHarts with respect to the claimed lack of authority of their former counsel, the transcript of record herein does not directly show the issue joined for trial in the prior action, although it can be inferred from the findings of fact and conclusions of law and from the judgment and decree entered in that case. (Tr. 275, 279.) At all events, this court may in these proceedings take judicial notice of the records and files of the district court in the previous suit. *Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 141 F.2d 1, 2 n.2 (2d Cir. 1944).

Memorandum of Settlement Agreement” and had instructed their attorney to execute the agreement on their behalf. (Tr. 277.) One of the terms of the agreement — a provision not uncommon in the compromise of lawsuits — was that “the parties will execute a mutual release of any and all claims of whatever character” the parties may have held against each other, except for obligations specifically set forth in the settlement agreement. (Tr. 269.) It is contrary to the undisputed record therefore to assert as do appellants that there has been no adjudication of the authority of their prior attorney to agree to a release of *all* claims as one term of the settlement of the prior litigation. The court’s judgment and decree in that matter expressly directed plaintiffs to execute the Release of All Claims implementing the provision quoted above (Tr. 280) and Mr. and Mrs. DeHart did so. (Tr. 344.)

In view of the foregoing, appellants surely cannot be heard in these proceedings to claim that this release, personally signed by them, was unauthorized. Under the rule of *res judicata* known as estoppel by judgment, or collateral estoppel, a question of fact which is put in issue and actually determined by a final judgment of a court of competent jurisdiction cannot later be relitigated by the same parties. The claims asserted in the two cases need not be identical for this result to follow. It is well settled that “even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.” *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897). Accord, *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948); *Riblet v. Ideal Cement Co.*, 54 Wash.2d 779, 345 P.2d 173, 175-76 (1959); Restatement, Judgments § 68. Appellants’

reliance on *Symington v. Hudson*, 40 Wash.2d 331, 243 P.2d 484 (1952) (App. Op. Br. 10) is misplaced, as that case involved the phase of the doctrine of *res judicata* which governs successive suits based upon the same cause of action and which has a wider range of conclusiveness, by way of merger or bar.

The central flaw in appellants' opening brief is its failure to come to grips with the Release of All Claims executed by the DeHarts. Indeed, that document is never mentioned in the brief. Instead, appellants seek to create the inaccurate impression that the "settlement" of the first lawsuit related solely to the antitrust violations there alleged. From this false premise, they argue that the judicial determination in Action No. 5145 that the settlement was authorized by the DeHarts can have no collateral estoppel effect in this purported breach of contract action. However, the general release signed by the DeHarts demolishes this contention and makes immaterial the nature of the two lawsuits. The indisputable fact is that in connection with the prior settlement, appellants released and discharged appellee "from any and all claims, demands and causes of action of whatever kind or nature" (Tr. 344), including obviously those for breach of contract. Appellants cannot now avoid the effect of that agreement simply by ignoring it.

2. The Alleged Issue of Intent

Appellants also contend that the scope and application of the release is a question of fact "based on the intentions of parties who signed it." (App. Op. Br. 8.) Again, appellants have failed to set forth any specific facts relating to intent showing this to be a triable issue. In any event, however, the meaning and effect of the release are plain from its face, and extrinsic evidence of the parties' intention would be inadmissible as a matter of law. In *Combined Bronx Amusements, Inc. v. Warner*

Bros. Pictures, Inc., 132 F.Supp. 921 (S.D.N.Y. 1955), an appeal from the granting of a summary judgment, the court said with respect to similarly-phrased releases: "The releases are in terms clear and unambiguous; oral testimony is neither necessary nor admissible when construing them." (132 F.Supp. at 921.) Accord, *Beaver v. Estate of Harris*, 67 Wash.2d 621, 627-28, 409 P.2d 143, 147 (1965).

3. The Alleged Issue of Consideration

Lastly, appellants state, cryptically and without any reasoning or further comment, that "the adequacy of the consideration given for the 'settlement' is also unresolved."* (p. 8.) In the district court, appellants set forth no facts showing this to be a triable issue, and no such facts are referred to in appellants' opening brief in this Court. Moreover, appellants have cited no authorities, and we are aware of none, which would permit a judicial inquiry into the adequacy of the consideration given for the release executed by the DeHarts. Finally, the nature of the substantial consideration passing from Richfield to the DeHarts in connection with the prior settlement is set forth in detail in the Memorandum of Settlement Agreement itself (Tr. 269) and in affidavits filed in support of the motion for summary judgment. (Tr. 334-60.) These facts are undisputed on the record

* Presumably this contention is distinct from that advanced during discovery proceedings in the district court that there had been a *failure* of consideration for the release signed by the DeHarts, in that Richfield allegedly had failed to comply with its agreement to execute a release in favor of the DeHarts. (Tr. 176.) This claim was shown to be erroneous in the affidavits filed in support of the motion for summary judgment (Tr. 347-50; 355-57), and evidently has been abandoned. Failure of consideration was also asserted by appellants in response to the motion (Tr. 365), but no supporting facts were set forth in their opposing affidavit. (Tr. 366.)

and fully support the motion to the extent that the consideration point is material at all.

C. Under Controlling Principles, Appellee Was Entitled to Summary Judgment as a Matter of Law.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

“ . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

The function of summary judgment is to avoid a needless trial, and the procedure is particularly effective with respect to an affirmative defense as to which, as here, the material facts are not subject to dispute because capable of categorical proof. The motion permits a party and the court to cut through the pleadings, which may on their face show formal fact issues, and determine by extraneous material that there is no genuine issue of fact to be tried. When the moving party sets forth facts appearing to support the motion the opposing party has “a duty to come forward in the district court with any additional or controverting facts which would call for a different result.” *Warren v. Lawler*, 343 F.2d 351, 358 (9th Cir. 1965). In this connection, a party’s unsupported claim of factual dispute is not sufficient to avoid summary judgment. *Specific facts which would be admissible in evidence must be set forth* and all affidavits must “show affirmatively that the affiant is competent to testify to the matters stated therein.” (Rule 56(e).) As the court said in *Short v. Louisville & Nashville R. Co.*, 213 F.Supp. 549 (E.D. Tenn. 1962), “the whole

purpose of summary judgment proceedings would be defeated if a case could be forced to trial by a mere assertion that a genuine issue exists, without any showing of evidence." (213 F.Supp. at 550.)

Summary judgments frequently have been granted where a legally sufficient release is asserted by defendant and plaintiff raises no genuine fact issue as to its validity.

Wagoner v. Mountain Savings and Loan Ass'n, 29 F.R.D. 138 (D. Colo. 1961), aff'd 311 F.2d 403 (10th Cir. 1962);

Taxin v. Food Fair Stores, Inc., 287 F.2d 448 (3d Cir.); cert. denied 366 U.S. 930 (1961);

Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 206-07 (9th Cir. 1950); cert. denied 340 U.S. 943 (1951);

Rotberg v. Dodwell & Co., 152 F.2d 100 (2d Cir. 1945);

Mahoney v. McDonald, 38 F.R.D. 161 (E.D. Pa. 1965);

Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F.Supp. 921 (S.D.N.Y. 1955).

Summary judgment was properly granted in this action, as it is based on purported claims which appellants for good consideration and with advice of counsel have released and discharged. Appellants' arguments for avoiding the effect of the release are frivolous. As Judge Learned Hand once said in rejecting similarly specious contentions while affirming summary judgment on the basis of a release:

"The argument is of a piece with the whole action, which has no merit, legally, morally or otherwise.

The interrogatory is objectionable in calling for an opinion and legal conclusion. E.g., *California v. The Jules Fribourg*, 19 F.R.D. 432, 435 (N.D. Cal. 1955); *Fishermen and Merchants Bank v. Burin*, 11 F.R.D. 142, 145 (S.D. Cal. 1951). In response, Richfield could only have repeated the allegations set forth in its affirmative defenses on the point. (Tr. 264-68.) Nothing which might have been said in answer to this question could have helped the DeHarts in sustaining their burden in the summary judgment proceedings to set forth specific facts showing that there is a genuine issue for trial.

The motion for inspection of documents was directed solely to materials alleged to be relevant to appellants' complaint. (Tr. 300, 222-26.) It was properly denied because of the total failure to make the required showing of good cause. In support of the motion plaintiffs filed a statement of points and authorities consisting of nothing more than a quotation of the text of Rule 34 of the Federal Rules of Civil Procedure. (Tr. 303.) There are several reasons why the documents sought by the DeHarts are irrelevant to any issues presented by their complaint, but in view of the nature of plaintiffs' moving papers it suffices to point out, as the Supreme Court has said, that "Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). And the burden is on the movant to establish good cause. E.g., *Groover, Christie & Merritt v. LoBianco*, 336 F.2d 969, 972 (D.C. Cir. 1964).

B. Appellants' Jury Demand

Appellants' specification as error of the district court's order striking plaintiffs' jury demand will become moot if the summary judgment entered below is affirmed, as

appellee urges. However, for completeness, we consider this final point briefly in closing.

Appellants served their demand for jury herein (Tr. 44) on January 28, 1966 (Tr. 58), concededly too late (Tr. 113), for under the provisions of Rules 38 and 81 they had already waived trial by jury. (App. Op. Br. 13.) The District Court accordingly had no choice but to strike the jury demand (Tr. 123) upon motion by Richfield. (Tr. 53.) Appellants' remedy was to seek to invoke the court's discretionary power under Rule 39(b) to relieve them of their waiver. That rule provides, in part, that "notwithstanding the failure of a party to demand a jury in an action in which such a demand [as provided in Rule 38] might have been made of right, the court in its discretion *upon motion* may order a trial by a jury of any or all issues." (Emphasis added.) Appellants made no such motion and thus failed to take the procedural step expressly necessary to restore the right they here complain of having lost. The authority relied upon by appellants in this respect, *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447 (9th Cir. 1960) (App. Op. Br. 13), is completely inapplicable, partly because appellants in that case did make a Rule 39(b) motion.

Furthermore, even had such a motion been made in this action, the only supporting showing in the record is a manifestly insufficient affidavit of appellants' counsel. (Tr. 115.) Discretion under Rule 39(b) is not exercised lightly. This court has indicated approval of the well-established view that "as a matter of judicial administration discretion ought rarely to be exercised to grant a trial by jury in default of a timely request for it." *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d at 449. See 5 Moore, Federal Practice 715-19. The affidavit here said to compel exercise of this discretion simply states that appellants' counsel talked with one of Richfield's attor-

neys “and understood from said conversation that all proceedings either by the plaintiffs or the defendant were stayed by agreement until after the plaintiffs’ Petition for Removal [sic] could be heard.” (Tr. 115.) The affidavit states no facts which would justify such an understanding, but even accepting it at face value an agreement in these terms could scarcely be reasonably construed as applying to the filing of a jury demand, the deadline for which is fixed by the Federal Rules and not subject to change by stipulation of the parties.

Moreover, it became apparent at the hearing before the district court on appellee’s motion to strike the jury demand that the “understanding” alleged in counsel’s affidavit was, by his own admission, factually unfounded. The transcript of these proceedings is not included in the record herein solely because of appellants’ failure to comply with the provisions of Rule 75(b)* governing designation of the record where appellant chooses to include less than the entire transcript. Under these circumstances, where the reviewing court finds the deficiency in the record material, such a default precludes consideration on appeal of the point involved. *Watson v. Button*, 235 F.2d 235, 237 (9th Cir. 1956).

* Rule 75(b): “Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and *a statement of the issues he intends to present on the appeal*. . . . If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the issues by the appellant, order such parts from the reporter or procure an order from the district court requiring the appellant to do so. . . .” (Emphasis added.)

CONCLUSION

Appellee respectfully submits that for the reasons advanced herein, and on the authorities cited, the summary judgment granted by the district court was plainly correct and should be affirmed.

Respectfully submitted,

GRAHAM, DUNN, JOHNSTON & ROSENQUIST
FRANK T. ROSENQUIST

O'MELVENY & MYERS
EVERETT B. CLARY
RICHARD C. WARMER

Attorneys for Appellee
Richfield Oil Corporation

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

RICHARD C. WARMER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF WASHINGTON NORTHERN DIVISION

RICHARD L. DeHART, PHOEBE
B. DeHART, his wife, d/b/a
DeHART OIL CORPORATION;
DeHART'S SNOHOMISH, INC.,
a Washington corporation; DeHART'S
EVERETT, INC., a Washington
corporation; DeHART'S MOUNT
VERNON, INC., a Washington
corporation and DeHART'S SEDRO
WOOLLEY, INC., a Washington
corporation,

Plaintiffs,

vs.

RICHFIELD OIL CORPORATION,
a corporation,

Defendant.

NO. 5145
PRETRIAL
ORDER

As the result of pretrial conference heretofore had, whereat the plaintiffs were represented by Lewis S. Armstrong and Gerald F. Collier, their attorneys, and defendant by Everett B. Clary of O'Melveny & Myers, Frank T. Rosenquist of Graham, Green, Dunn, Johnston & Rosenquist, and Kenneth P. Short of Short, Cressman & Cable, their attorneys of record, the following issues of fact and law were framed and exhibits identified.

JURISDICTION

1. Jurisdiction is vested in this court pursuant to 58 Stat. 731, (15 U.S.C.A. Sec. 15) and 38 Stat. 737 (15 U.S.C.A. Sec. 26).

ADMITTED FACTS

2. The following facts are admitted by the parties:

(a) That on March 10, 1964 William L. Dwyer, who was then one of the attorneys of record for plaintiffs, and Frank T. Rosenquist, who was then and there one of the attorneys of record for defendant, executed a "MEMORANDUM OF SETTLEMENT AGREEMENT" a true copy of which is attached to the defendant's answer and cross complaint and which "MEMORANDUM OF SETTLEMENT AGREEMENT" is marked as defendant's Exhibit 1.

(b) That on or about May 4, 1964 and on or about July 10, 1964 the defendant, through said Rosenquist, delivered to Seattle First National Bank, as escrow holder, all of the documents contained in defendant's Exhibit 2.

DISPUTED FACTS

The plaintiffs contend as follows:

(a) That they did not authorize or ratify the "MEMORANDUM OF SETTLEMENT AGREEMENT", and that the same departs from their instructions to the said Dwyer in that:

1. There were to be mortgages placed on only two of the service stations.

2. The mortgage debt reduction would be in a non-taxable form.

3. Defendant would supply plaintiffs with gasoline and would finance the purchase thereof by plaintiffs.

The defendant contends as follows:

(a) That the plaintiffs authorized and ratified the execution, by William L. Dwyer, their attorney, of defend-

ant's Exhibit 1, the "MEMORANDUM OF SETTLEMENT AGREEMENT".

ISSUES OF FACT

The only issue of fact to be determined by the court is whether or not the execution of the "MEMORANDUM OF SETTLEMENT AGREEMENT" of March 10, 1964 was authorized or ratified by plaintiffs.

ISSUES OF LAW

None.

EXPERT WITNESSES

None.

OTHER WITNESSES

1. On behalf of plaintiffs:

- (a) Richard L. DeHart
- (b) Phoebe B. DeHart
- (c)
- (d)

2. On behalf of defendant:

- (a) William L. Dwyer
- (b) Charles S. Burdell
- (c) Frank T. Rosenquist
- (d) Edward West, Jr.
- (e)
- (f)

EXHIBITS

The exhibits below listed were produced and marked and may be received in evidence without objection:

(a) Plaintiffs' Exhibits:

1. Plaintiffs' Exhibit 1, copy of letter, William L. Dwyer to Charles S. Burdell, dated June 1, 1964.

(b) Defendant's Exhibits:

1. Defendant's Exhibit A, copy of the "MEMORANDUM OF SETTLEMENT AGREEMENT".

2. Defendant's Exhibit B, copy of escrow documents delivered by defendant to Seattle First National Bank.

3. Defendant's Exhibit C, copy of letter of March 23, 1964 from Rosenquist to Seattle First National Bank.

4. Defendant's Exhibit D, copy of letter of March 24, 1964, Edward West, Jr. to Rosenquist.

5. Defendant's Exhibit E, copy of letter of June 16, 1964, Rosenquist to Dwyer.

6. Defendant's Exhibit F, copy of option agreement from plaintiffs to Gull Oil Company, dated April 3, 1964.

The exhibit below listed was produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that said exhibit is what it purports to be:

Plaintiffs' Exhibit 2, miscellaneous handwritten notes of William L. Dwyer.

ACTION BY THE COURT

The Court has ruled that:

(a) In accordance with Rule 42(b), this phase of the case is severed from the anti-trust phase of the case and will be separately tried as a non-jury case on November 17, 1964.

(b) Trial briefs shall be submitted to the Court on or before November 10, 1964, and any reply briefs by November 13, 1964.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signature of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 16th day of October, 1964.

/s/ W. T. BEEKS
UNITED STATES DISTRICT JUDGE

Form Approved:

/s/ LEWIS ARMSTRONG
Attorney for Plaintiffs

/s/ KENNETH P. SHORT
Attorney for Defendant

United States Court of Appeals
For the Ninth Circuit

RICHARD L. DEHART and PHOEBE D. DEHART, his
wife, d/b/a DEHART OIL COMPANY, *Appellants*,

vs.

RICHFIELD OIL CORPORATION, a corporation, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

APPELLANTS' REPLY BRIEF

KENNETH R. LONG
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United States Court of Appeals
For the Ninth Circuit

<div>Richard L. DeHart and Phoebe D. DeHart, his wife, d/b/a DeHart Oil Company, <i>Appellants</i>, <i>vs.</i> Richfield Oil Corporation, a corporation,</div>	<div>No. 21597 <i>Appellee.</i></div>
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ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

APPELLANTS' REPLY BRIEF

SUPPLEMENTED STATEMENT OF THE CASE

This is an appeal to reverse an Order of Summary Judgment entered by the District Court on Appellee's (hereinafter "Richfield") motion that there were no genuine issues as to any material facts relating to the affirmative defense that Appellants' (hereinafter "the DeHarts' ") action for Breach of Contract had been released and discharged. (Tr. 320)

The "MEMORANDUM OF SETTLEMENT AGREEMENT" was executed by the attorney for the DeHarts to settle three lawsuits then pending between the parties. Those three were, a foreclosure suit

brought by Richfield, a suit on a debt brought by Richfield, and an anti-trust action brought by the DeHarts.

Richfield asserted the settlement as a defense to the anti-trust suit (Civil Action No. 5145) after the DeHarts refused to dismiss the action and execute the documents required by the settlement because their attorney has exceeded his limited authority to settle the lawsuits by not including certain items in the settlement agreement. The District Court held a separate trial to determine the validity of the "MEMORANDUM OF SETTLEMENT AGREEMENT" since a finding of validity would have resolved the anti-trust action against the DeHarts. The court was solely concerned with whether or not the anti-trust cause of action was within the terms of the settlement and whether or not the attorney for the DeHarts was authorized to settle the anti-trust action. The court found that the settlement agreement did settle the anti-trust action and that the attorney for the DeHarts was authorized to compromise the claims set forth in the anti-trust complaint. (Tr. 33, Findings of Fact and Conclusions of Law). No other factual issues were before the court.

Richfield now asserts that the finding of the court that the DeHarts had authorized their attorney to settle the anti-trust lawsuit was also a finding that he was authorized to settle any and all causes of action the DeHarts had against Richfield even though he may not have known what they were. They seek to torture the District Court's findings in the anti-trust lawsuit into a judgment holding that the attorney for the DeHarts was authorized to surrender any and all claims the DeHarts had against Richfield.

The specification of errors regarding the objections to plaintiffs' interrogatories and plaintiffs' motion for production of documents relate to the DeHarts' ability to show the existence of genuine issues of material facts. The specification of error regarding plaintiffs' jury demand is prompted by the DeHarts' desire to secure as impartial a trial as possible.

ARGUMENT

A. COLLATERAL ESTOPPEL

Appellee has correctly concurred with Appellants' position that this appeal involves the doctrine of collateral estoppel rather than the broader principles of *res judicata*. (Appellee's Brief p. 9-10.) Collateral estoppel works only as to material fact issues decided in the previous cases between the parties. To prove the factual issues decided in the prior lawsuit, Appellee would have this court look at the "Pre-Trial Order" which is reproduced as Appendix A of Appellee's brief. Appellee does not mention in its brief the "Findings of Facts and Conclusions of Law" entered in the prior case. Appellee does not want the court to consider the only real finding of fact entered regarding the settlement because it cannot overcome the clearly worded finding no. 3 written by the Appellee. The court in the anti-trust lawsuit, entered as finding No. 3 that:

"Plaintiffs, and each of them, instructed and authorized Dwyer to *compromise the claims set forth in the Complaint herein* [emphasis added] on the terms contained in the "Memorandum of Settlement Agreement" (Defendants Exhibit A) and to execute said agreement on Plaintiff's behalf." (Tr. 35.)

Where are the Findings of Fact necessary to support Summary Judgment in the instant case? There is no finding of fact that the attorney for the DeHarts was authorized to compromise more than the claims set forth in the Complaint. There is no finding of fact that the DeHarts authorized their attorney to surrender the breach of contract claim. There is no finding of fact that the parties contemplated a settlement which encompassed more than the settlement of the claims relevant to the three lawsuits specifically enumerated therein. There is no finding of fact that the DeHarts' attorney even knew about the breach of contract claim. The DeHarts, rather than Richfield, are entitled to the benefits of collateral estoppel. The finding that the DeHarts' attorney was only authorized to compromise the claims set forth in the anti-trust complaint should be sufficient to defeat Richfield's contention that the settlement also compromised the present cause of action.

B. RELEASE OF ALL CLAIMS

Appellee suggests that the Appellants' failure to mention the Release of All Claims is the "central flaw" in the DeHarts' appeal to secure a trial. (Appellee's Brief p. 10) The release in question was executed by the DeHarts pursuant to the judgment entered after the trial involving the authority given the DeHarts attorney to compromise the claims asserted by them in the anti-trust lawsuit. The release was but one of the documents required by the "Memorandum of Settlement Agreement" to compromise the three lawsuits. The court's judgment required the DeHarts to execute these documents, including the release, on or before December 18, 1964. Out of obedience to the court, the DeHarts did execute the release and other documents

required by the court's order rather than to have their attorney do so under the alternative mode of execution provided for in the order. The important question is whether this release executed pursuant to a settlement agreement which was agreed to by an agent with limited authority can effectively release claims which were beyond the scope of that agent's authority. In other words, the release cannot release anything more than what was within the agent's authority to compromise.

It would be a rare release which did not include broad, expansive and universal language. The difficulty with such language is that it is so often at variance with what either party to the release actually contemplates. The two sentence release which Appellee alleges to be so important actually states in the second sentence that it is intended, "as a bar to each and every claim, demand and cause of action *hereinabove specified*". [Emphasis added.] (Tr. 345) The only claim, demand or cause of action specified in the prior sentence of the release is: "Richard L. DeHart, et al., plaintiffs, v. Richfield Oil Corporation, a corporation, defendant, being action No. 5145 . . . (Tr. 344). Webster's New Collegiate Dictionary defines the word "specify" as meaning "to name or state explicitly or in detail." The release does not state an intention to release unspecified claims. It is submitted that the general language relates solely to items of damages which might have been claimed in the anti-trust cause of action and that the clearly stated intention of the release is to surrender only those claims specified.

Appellee contends that what was intended to be included within the terms of the settlement does not give rise to a fact issue. Yet even Appellee is confused over

whether the contract which is the subject of this lawsuit was intended to be included in the settlement. Its brief argues that the contract was terminated by "mutual agreement" in 1960. (Appellee's Brief p. 6) There is no evidence that either the DeHarts or Richfield contemplated that the distributorship contract was being released by the settlement.

At the time the settlement was executed, there were only four areas in which Richfield and the DeHarts were involved with each other. Three of them were subject to lawsuits at the time of the settlement and each was specified in the settlement. Those three were the mortgage foreclosures, the action on the debt, and the anti-trust action. The fourth area involved the distributorship contract. There was absolutely no reason not to specify the distributorship contract as included within the terms of the settlement or in the release. The contract represents the only area of contention between the parties which was not specified in the contract. Is it reasonably that such an important item would not have been specifically included in the settlement had the parties intended to settle it also? Is it reasonable to suppose that Richfield and the DeHarts' attorney thought they were releasing in 1964, a contract which Richfield still argues to have been terminated by mutual agreement in 1960?

For Richfield to prevail on its motion for summary judgment, the findings of fact in the anti-trust action must state (1) that the distributorship contract was within the contemplation and authority of both parties when the settlement was executed by their representative, (2) that the DeHarts' representative was authorized to release the breach of contract claim, and (3) that the breach of contract claim was within the terms

of the settlement. None of these facts has been determined upon any trial or hearing. None of these facts has been admitted by the DeHarts. None of these facts has been asserted by Richfield.

The "Pre-Trial Order", reproduced as Appendix A in Appellee's Brief, lists three disputed fact questions all concerning the authority given the DeHarts' attorney. They include, (1) a dispute over the number of mortgages to be given, (2) a dispute over the form of the debt reduction, and, most importantly, (3) a dispute over whether Richfield was to supply gasoline to the DeHarts and finance the purchase thereof by them. Is it reasonable to assume, in light of the court's finding that the DeHarts did not instruct their attorney to secure a supply of gasoline, that they authorized their agent to surrender the breach of contract claim even after being blackballed by the entire gasoline industry? Preserving either the breach of contract claim or the supply of gasoline was the only way the DeHarts had to preserve their livelihood. For Richfield, the principal objective of the settlement was to achieve a surrender by the DeHarts of their anti-trust claim. In return, the mortgages on the DeHarts' station were to be assumed by a financial institution, freeing the DeHarts from the tyranny of a mortgagee which also controlled their livelihood.

Appellee urges that the adequacy of the consideration given for the settlement has no bearing on the issues raised by this appeal. It reasons that, because the law does not permit judicial inquiry into the adequacy of the consideration for the purpose of setting aside the settlement, the consideration question is therefore entirely irrelevant. This is entirely wrong because the DeHarts are not seeking to set aside the

settlement, but rather to show that the settlement only compromised the claims set forth in the anti-trust complaint. A factual examination into the consideration given in return for the compromise of the anti-trust claims will show the unreasonableness of Appellee's claim that the breach of contract cause of action was intended to be settled. The adequacy of the consideration given is a material fact which will tend to show the intent of the parties to exclude the contract cause of action from the terms of the settlement.

C. SUMMARY JUDGMENT AND SETTLEMENTS

The history of the prior litigation shows that, before the anti-trust cause of action could be dismissed on the basis of a settlement, there had to be a trial on the factual question of the agent's authority to compromise those claims. The same settlement agreement has been asserted as a defense to the contract cause of action in this lawsuit but there has not been a factual determination that the agent was authorized to compromise the contract claims involved in this action. Under Rule 56 (c) of the Federal Rules of Civil Procedure, the moving party must show that no genuine issue as to any material fact exists. There are on record no pleadings, depositions, answers to interrogatories, admissions on file, or affidavits which show that the attorney for the DeHarts was authorized to compromise the contract cause of action. This being so, there was nothing for the DeHarts to controvert.

When a settlement which has been executed by an agent, is asserted as a defense, the party relying on it has the burden of proving both the fact of the agency of the party executing it, and his authority as agent to do so. 76 C. J. S. RELEASE, §65, p. 707. In this

case, no evidence has been presented to show the authority of the agent to release anything more than the claims set forth in the anti-trust complaint. Assuming for the purpose of argument that Richfield had shown that there was no genuine issue as to any material fact, summary judgment still was erroneous because the DeHarts either effectively controverted Richfield's evidence or have stated reasons why they could not state facts to justify their opposition as is permitted by Rule 56 (f) of the Federal Rules of Civil Procedure.

The DeHarts have controverted Richfield's assertion that no material facts exist by their answers to interrogatories directed to plaintiffs. (Tr. 173) Specifically, in Interrogatory No. 1 (Tr. 173) Richfield asked if the DeHarts contend that the release of all claims is inapplicable to the present lawsuit. The DeHarts answered under oath that they do so contend. Despite the fact that Interrogatory No. 2 (Tr. 174) calls for a legal conclusion, the court required the DeHarts to answer whether they contended that the release of all claims was "invalid or void or voidable." The DeHarts did so contend. In Interrogatory No. 3 (Tr. 174) the court required the DeHarts to list each legal ground on which they contend that the release of all claims is invalid or void or voidable. They did so. In the "Affidavit of Richard L. DeHart and Phoebe D. DeHart" (Tr. 366, 367) they reiterate their position that their attorney had limited authority to enter a settlement agreement. These statements alone, made under oath, ought to be sufficient to show that genuine issues as to material facts remain unrevolved.

More important than plaintiffs' statements under oath controverting specific facts required to be uncontroverted in order for summary judgment to be

proper, is the fact that the District Court categorically refused the DeHarts the right to discover by interrogatories the facts which would unequivocally show that genuine issues as to material facts remain unresolved. The lower court by its order entered October 18, 1966, sustained defendant's objections to plaintiffs' interrogatories and denied plaintiffs' motion for production of documents. (Tr. 318) This prevented the DeHarts from securing answers to the following interrogatories relating to the settlement which was later the basis for the summary judgment:

Interrogatory 22. "Please provide a list of the dates and times of all communications, oral or written, with either William O'Dwyer or Charles Burdell [plaintiffs' attorneys] in relation to settling the Richfield Oil Corporation disputes with the plaintiffs' herein."

Richfield's objection to this interrogatory was that the information sought is "irrelevant to any issue in the cause". (Tr. 228) As stated in their affidavit, the DeHarts expect this correspondence to show the true authority given their attorneys. (Tr. 367)

Interrogatory 35. "Is it not true that Lewis S. Armstrong [plaintiffs' attorney at the trial in Civil Action No. 5145] met with officials of Richfield Oil Corporation in California prior to the hearing November 18, 1964, before the Honorable William T. Beeks?"

Richfield's objection to this interrogatory was that it was also irrelevant to any issue. (Tr. 228)

Interrogatory 36. "If the answer to the foregoing is in the affirmative, state with whom Lewis S. Armstrong met; and, what negotiations he made with Richfield Oil Corporation on his own behalf or on behalf of the plaintiffs herein."

Again the objection was on the grounds of irrelevancy. (Tr. 228) These interrogatories all relate to the settlement agreement and the adjudication of its validity. Yet the court on October 18, 1966, agreed with Richfield that interrogatories such as No. 22 were irrelevant to any issue in this cause and then on November 23, 1966, granted summary judgment based on the settlement which was the subject of plaintiffs' interrogatories.

The same order which sustained defendant's objections to plaintiffs' interrogatories also denied plaintiffs' motion to inspect certain documents including the correspondence between the DeHarts and Richfield. (Tr. 233, Interrogatory No. 3) This too hindered appellants' ability to state controverting facts in affidavits.

Richfield in its brief has cited numerous cases where summary judgment was granted on the basis of a settlement which was not shown to be void or voidable. Not one of those cases involves the authority of an agent to execute a settlement. Not one of those cases involves the scope of the agent's authority. Not one of those cases involves a releasor claiming in a subsequent action that one or more of his claims were not relinquished by the prior release. Instead, Richfield's cases fit the factual situation of a releasor personally signing a release of the sole claim he has against the person asserting the release and subsequently claiming the release was void or voidable for one or more legally insufficient reasons. Clearly, Appellee's cases are inapplicable to the case at hand both as to law and fact.

D. APPELLANTS' JURY DEMAND

The great desire by litigants to have a jury decide their disputes should not be denied lightly. Appellants' attorney at the trial level submitted a sworn affidavit stating his reasons why the jury demand was not timely made. (Tr. 115) Appellee in its brief states that at the hearing on its motion to strike the jury demand, it "became apparent" that trial counsel's understanding was factually unfounded. (Appellee's Brief p. 18) No attempt has been made by Appellee to supplement the designated record with the transcript from that hearing. There is no evidence in the designated record that trial counsel repudiated his affidavit. If, however, the court desires to consider matters outside the designated record, it may be noted that the trial court took the position that where rule 38 of the Federal Rules of Civil Procedure is not complied with the court will strike a request under Rule 39 because it does not know what standard to apply in exercising its discretion.

CONCLUSION

Appellant respectfully submits that for the reasons advanced herein, numerous genuine issues as to material facts remain unresolved which require reversal of the order of summary judgment and an order of remand permitting discovery by Appellants and a trial on the merits, or, at the very least, a factual examination into the scope of the settlement. It is also submitted that such a trial should be before a jury.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with the rules.

Kenneth R. Long

United States Court of Appeals

FOR THE NINTH CIRCUIT

N JULIUS CHRIS FISHERMAN,
O,

Appellant,

2 vs.
1

5 WALTER D. ACHUFF, etc.,
9

8 Appellee.

APPELLANT'S OPENING BRIEF

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NO. 21598

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JULIUS CHRIS FISHERMAN,

Appellant,

vs.

WALTER D. ACHUFF, ETC.

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION

The Appellant is presently held in the custody of the Respondent pursuant to two commitments from the Superior Court of the County of Los Angeles, State of California. The first one was a conviction of Penal Code §459 (Burglary of the Second Degree) hereinafter referred to as BURGLARY CONVICTION for which he was sentenced to State Prison for the term prescribed by law in 1956. The second commitment arose out of a plea of guilty entered to Health and Safety Code §11501 (Sell, furnish or give away a narcotic drug) hereinafter referred to as NARCOTIC CONVICTION on May 17, 1960. (Record p. 2)

An appeal was taken from the imposition of judgment pronounced on July 31, 1964 in the NARCOTIC CONVICTION. The Court of Appeal of the State of California, Second Appellate District, affirmed said judgment on September 30, 1965. denying a petition for re-hearing. A Petition for a Hearing was subsequently denied by the Supreme Court of the State of California. The opinion of the Court of Appeal is reported in 237 Cal. App. 2d 356. After duly applying to the Courts of the State of California for collateral relief which was not granted, a Petition for Writ of Habeas Corpus was filed in the United States District Court pursuant to 28 U.S.C. §2254. The writ was issued and after oral argument upon the issues set forth therein said petition was denied. (Record p. 29) On January 3, 1967 the Honorable Leon R. Yankwich

issued a Certificate of Probable Cause certifying that the appeal sought to be taken from the order denying relief was taken in good faith in accordance with 28 U.S.C. §2253. (Record p. 31)

STATEMENT OF FACTS

The facts of the instant case, for the purpose of appeal, are set forth in the following paragraphs:

On May 17, 1960, a plea of guilty was entered to the second count of the amended information - Health and Safety Code--the NARCOTIC CONVICTION. On June 20, 1960, attorney for Appellant made a motion for withdrawal of the plea of guilty previously entered. There was never any ruling on this motion. At this point the Judge called for a discussion at the bench with Counsel. The judge then indicated his intention to provide hospitalization. On that premise attorney for the defendant allowed the sentencing procedure to continue. The court then made such an order. (Record p.5)

The order of the Court was entered committing appellant to the State Department of Mental Hygiene pursuant to California Welfare and Institutions Code Section 5355. Previous to this order a State Psychiatrist was appointed to examine defendant pursuant to Section 5355 of the W. & I. Code. The psychiatrist's report to the Court was prepared and headed under this section, the bill authorizing the payment and the voucher were made out pursuant to this section

and signed by the Judge. The probation report discussed commitment under this section and was read and initialed by the Judge. All parties, the District Attorney, the Court, the Probation Officer, the Psychiatrist, Counsel for the defendant and the Defendant were proceeding pursuant to this section from May 17, 1960, at plea, through commitment to the State Hospital at Atascadero, under the order for not less than Three Months nor for more than Two Years and subsequent discharge therefrom on December 9, 1960, and up to February 6, 1961, when the Court issued its bench warrant. On February 9, 1961, appellant with counsel answered the bench warrant at which time an order was made changing the order of June 20, 1960, (Nunc Pro Tunc) by striking the words "Section 5355 of the Welfare and Institutions Code" and adding the words "Section 5360 of the Welfare and Institutions Code". The Court claiming that inadvertant error had reconferred jurisdiction for the Nunc Pro Tunc Order. (Record p.6)

Previously, appellant had been sent to prison in 1956 BURGLARY CONVICTION. He was paroled in 1959, his sentence being fixed at Five Years--Two and one-half Years in custody and Two and One-Half Years on parole. Upon being discharged from the Hospital appellant was picked up at home by his parole agent for violation of parole. The violation alleged was the plea of "guilty" in court to the NARCOTICS CONVICTION. His parole and discharge date were extended by Adult Authority Action on December 16, 1960, for a period of time of Six-

Months-the period of time from the guilty plea to discharge from the Hospital.

On June 28, 1961, ~~appellant~~ entered Ingleside Lodge Sanitarium under orders of his psychiatrist. The parole officer was notified of this by ~~rappellant~~'s sister the following morning. An equivocal nalline test had a psychologically disturbing effect, resulting in a decision by ~~appellant~~ and his psychiatrist that daily intensive therapy in a clinical atmosphere might overcome his anxieties and depressions. He had taken no medication until this date and none was prescribed in his treatment. The parole officer arrived at the sanitarium the next day and ~~appellant~~ explained that he was there to receive intensive therapy. He also informed the parole officer that he had taken 4 pain relievers - a medication called Darvon - for pain caused by loss of a temporary tooth filling.

At this point the parole officer ordered ~~appellant~~ to check out of the sanitarium without consulting appellant's psychiatrist or the doctor in charge of the sanitarium, saying he was going to lodge ~~appellant~~ in jail pending the outcome of the scheduled court action on July 28, 1961. When ~~appellant~~ refused to do so without his psychiatrist's consent the parole officer attempted to put handcuffs on him. Appellant started to run but slipped and fell after which he was taken to County Jail. On August 25, 1961, the Judge after ordering a supplemental psychiatric examination reviewed

the narcotic conviction case in addition to the reasons why appellant was in the County Jail pending parole violation. He thereupon placed appellant on probation for a Five Year period and Ordered his Release. This order/sentence was for the same case appellant had been unqualifiedly discharged from Atascadero on December 9, 1960. Appellant was not released; and on September 6, 1961, he was returned to prison with two violationscharges confronting him at the parole violator's board in addition to the charge that he plead guilty in case number 226243. (Record p. 7)

The first two charges were:

1. Using Narcotics. (Darvon is not a narcotic)
2. Attempting to escape from a parole agent.

At the parole violator's hearing appellant pleaded not guilty to charges 1 and 2 and guilty to charge 3. The certification of the hearing incorrectly states that appellant pleaded guilty to all 3 charges.

On October 13, 1961, the Court, without defendant and/or his counsel being present, upon learning that appellant had been returned to prison, revoked probation and without arraignment for judgment sentenced appellant to State Prison as the law prescribes. The commitment being received at the Prison by mail on November 1, 1961.

On March 1, 1962, the Court being convinced that it had acted contrary to appellant's rights under the Sixth Amendment cancelled its previous order sentencing appellant

to prison using as precedent the decision of In re KLEIN, 197 Cal. App. 2d 58, and reinstated probation. This order became effective on May 4, 1962, when the institution received notification from the Court of its action.

On March 3, 1960, a complaint was filed charging defendant with possession of Heroin (Calif. Health and Safety Code Section 11500). On March 18, 1960, defendant was held to answer the charge. On April 26, 1960, the day initially set for trial, the information (#226243) was amended to add a new, more onerous different count to the information-- Count Two-Sale of Heroin (Calif. Health and Safety Code Section 11,501) NARCOTIC CONVICTION. (Record p. 8)

On July 31, 1964, after appellant had once again been placed on parole, he was brought back to court for probation violation. His counsel at that time, PAUL AUGUSTINE, said:

"I have read that (probation) report and discussed this matter with the defendant but I am inclined to think that the Court has no alternative but to sentence him to State Prison..."

(Record p. 9)

SPECIFICATION OF ERROR

(1) The court was required to conduct a full evidentiary hearing to establish the existence of the allegations set forth in the petition.

(2) In proceeding to pronounce sentence upon appellant after the motion to withdraw the plea of guilty had been made without ruling thereon the court in effect extended a benefit in consideration of the retention of said plea.

(3) The judgments and orders of a Court as it purports to act with respect to an individual without in fact having jurisdiction over the person are null and void.

(4) When there are repetitive prosecutions and punishments for a single offense, such conduct will be prohibited by the due process clause of the fourteenth amendment.

(5) The imposition of punishment and penal confinement after a course of treatment had been decreed and successfully completed was cruel and unusual punishment as proscribed by the eighth amendment.

(6) The violation of the parole of appellant was predicated upon falsified data violating all standards of due process.

(7) The appellant was deprived of the effective representation of counsel at the time of imposition of sentence in 1964.

(8) The amendment of the information to charge an offense not shown to exist either by information or indictment at the time of arraignment in Superior Court was in derogation of appellants constitutional rights.

ARGUMENT

I

THE COURT WAS REQUIRED TO CONDUCT A FULL EVIDENCIARY HEARING TO ESTABLISH THE EXISTENCE OF THE FACTS SET FORTH IN THE ALLEGATIONS IN THE PETITION.

In Townsend vs. Sain, 372 U.S. 293 (317), the Courts said: "If, for any reason not attributable to the inexcusable neglect of petitioner evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."

In Trusty vs. Oklahoma, 360 Fed. 2d 173 (175), where the petitioner set forth facts alleging an unlawful search and seizure, the court held that he was not entitled to an evidenciary hearing as these matters were fully considered at the time of trial when the states witness gave testimony that was not contradicted at that time.

In Carroll vs. Turner, 262 F. Supp. 486, the court held that where the federal habeas corpus petition set forth facts indicating the sentence was void and subject to collateral attack an evidenciary hearing must be held where he had

to recieve a full and fair evidenciary hearing on this point in the state court at the time of trial or in a collateral proceeding where the facts set forth were in dispute.

In Randel vs. Beto, 354 Fed. 2d 496, the court held that where there was a question as to whether or not the petitioner had vaived his right to a jury trial an evidenciary hearing should be granted to determine whether such a waiver did in fact occur.

In Fortner vs. Balkeom (Fifth Circuit 7/7/67) the court said that where substantial constitutional questions are presented which are unrefuted, the Court should duly consider their validity and not dispose of the petition inaa perfunctory manner.

In the instant case, each one of the irregularities set forth occurred subsequent to the initial entry of the plea to the offense charged. Each ground set forth in itself indicates an independant violation of the constitutional rights of the appellant. The conflict that exists between the allegations which are a part of the petition and the contentions of the respondent are illustrated in the "Order" prepared by the respondent and executed by the District Judge. As a provision thereof it states that "the petition states no meritorious reason" for relief to be granted to the petitioner. (Record p. 30, lns. 30-31) In contra-distinction to the other provisions of the order which deny relief to the appellant "as a matter of law", this part-

icular conclusion must therefore be a denial of the existence of the facts as alleged in the petition. A hearing should have been granted for a full consideration of all of the issues presented.

The court in failing to agree to an evidenciary hearing prevented the appellant from proving the allegations in the petition and thereby securing the relief prayed for therein.

II

IN PROCEEDING TO PRONOUNCE SENTENCE UPON APPELLANT AFTER THE MOTION TO WITHDRAW THE PLEA OF GUILTY HAD BEEN MADE WITHOUT RULING THEREON THE COURT IN EFFECT EXTENDED A BENE-FIT IN CONSIDERATION OF THE RETENTION OF SAID PLEA.

In Waley vs. Johnson, 316 U.S. 101 (106), the court said "...for a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession".

In Cicenia vs. La Gay, 357 U.S. 504, the court held that the Federal District Court had the power to inquire into the voluntariness of a confession in a habeas corpus proceeding.

In Shotwell Manufacturing Company vs. United States, 371 U.S. 341 (374) the court said:

"...confessions are equally involuntary whether obtained by hope or fear..." (emphasis added)

In Fay vs. Noia, 372 U.S. 391 (410), the lower federal courts do not "...hesitate to discharge state prisoners whose convictions rested on unconstitutional statutes or had otherwise been obtained in derogation of constitutional rights".

In Machibroda vs. United States, 368 U.S. 487 (493), the court said:

"A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack."

In Gilmore vs. California, 364 F. 2nd 916, where the defendant pleaded guilty and there were allegations of misrepresentations as to what the penalty for the offense might be, the court held that the Petitioner was entitled to a hearing to determine if in fact there had been such misrepresentations.

In Doran vs. Wilson, 369 F. 2d 505, the court held that while a plea of guilty will constitute a waiver of all nonconstitutional defenses the effect of a constitutional deprivation must be taken into consideration in the retention of the plea of guilty and said plea must not be the product of a violation of fundamental constitutional rights. If he was so motivated by these occurrences or by "his own knowledge of his guilt and the desire to take his medicine"

is the crucial question which should have been decided.

Here the appellant made a motion to withdraw his plea of guilty prior to the initial imposition of sentence on June 1960. In consideration of appellants forbearing to insist upon the withdrawal of said plea which should have been given liberal consideration prior to the entry of judgment, the court conferred "hospitalization" in lieu of a penal commitment. This in effect amounted to a "benefit" which in effect compromised the free and voluntary character which should in fact be the essence of a plea of guilty. The utilization of this inducement makes the plea of guilty no more lawful than the obtaining of a confession and/or a plea of guilty through other unlawful means.

With the representation having been made that "hospitalization" would be the only penalty" which he would be subjected to the appellant would be entitled to relief if there was in fact a misrepresentation which induced him to retain the plea that he entered in the first instance. If at the time of the hearing that is required herein it is shown that the motivation for the action of the appellant with respect to his plea was predicated upon the grant of "hospitalization" and not upon his guilt of the charges set forth in the information, then the free and voluntary character of the plea is thereby compromised.

III

THE JUDGMENTS AND ORDERS OF A COURT AS IT PURPORTS TO ACT WITH RESPECT TO AN INDIVIDUAL WITHOUT IN FACT HAVING JURISDICTION OVER THE PERSON ARE NULL AND VOID.

In Ex Parte Stricker, 109 F 145, the court held that there must not only be a tribunal competent to act, but, where an action of the court involves the personal liberty of the defendant, he must, except in cases of actual contempts committed in the presence of the court, be brought within the jurisdiction of the court.

In Anderson vs. Anderson, 215 N.Y.S. 2nd 155, the court held that the rendition or enforcement of personal judgment against a defendant over whom the state has no jurisdiction involves a violation of due process.

In Lankton vs. Superior Court, 5 Cal. 2d 694, the Court said "If the Court misconstrued the evidence before it or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical which could therefore be corrected by the Court on its own motion".

In Key System Transit Co. vs. Superior Court, 36 Cal. 2d 184, the court stated: "Trial Court has jurisdiction to correct mistakes in its orders and records, if such mistakes are not actually the result of exercise of judgment, but where the error is inherently judicial rather than clerical

or inadvertant the Court has no power to amend its decision."

In Bruce vs. Bruce, 296 P2nd 310, the court said: "A judgment or decree Nunc Pro Func may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." (emphasis added)

In Siegal vs. Superior Court, 251 A.C.A. 555 (559), the court held that the function of a nunc pro tunc order in causing an order to be entered now for an order previously made is to make its records conform to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never, in fact, given.

The court in originally committing appellant to Atascadero acted pursuant to the provisions of 5355 of the Welfare and Institutions Code. The commitment of the court was under that section, the appointment of the psychiatrist and the preparation of his report were pursuant to that section. The billing statement and the payment thereof were made under the same code section. No probationary sentence was ever imposed. These steps having taken place, there was no clerical error that could have been corrected. The intent of the court to bring about this result is evidenced by the consistancy of his aforementioned actions. If the court intended something else, this would be judicial error and could not be corrected by a nunc pro tunc order.

When appellant was subsequently discharged from

Atascadero having fulfilled the order of the Court as set forth in the judgment, the court no longer had any connection or contacts with defendant to act with respect to him. To bring him into court, without jurisdiction, and purport to make orders of an illegal character is a nullity and therefore a denial of due process.

When the court in August 1961, purported to impose a probationary sentence pursuant to this invalid order this similarly was a denial of procedural due process.

When the court attempted to once again impose probation on March 1, 1962 after appellant had been sentenced to state prison some five months before it was acting in excess of its jurisdiction inasmuch as such an order can be made only within thirty days after court has notice of the execution of the judgment. In making the new order there is nothing in it to indicate that he just obtained this knowledge. To the contrary, it was pronounced because the court realized that it had deprived appellant of another essential constitutional right--the right to counsel.

(California Penal Code 1203.2)

IV

WHEN THERE ARE REPETITIVE PROSECUTIONS
AND PUNISHMENTS FOR A SINGLE OFFENSE, SUCH
CONDUCT WILL BE PROHIBITED BY THE DUE
PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The court in United States ex rel Hetendyi vs. Wilkins,

348 F2d 844 (849), the court "...held that double jeopardy is a fundamental right within the doctrine of selective incorporation and this guarantee of the Bill of Rights is thus made applicable to the states thereby."

In Norkett vs. Stallings, 251 F. Supp. 662, (665), the court held that where there is a situation of multiple prosecutions that is shocking to the conscience, "the Fourteenth Amendment then may operate to extend to the states the privileges accorded by the Fifth Amendment, in order to preserve those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions'".

In Barnett vs. Gladden, 375 F 2d 255, the court held that apart from the Double Jeopardy Clause of the Fifth Amendment, the Due Process clause of the Fourteenth Amendment "standing alone, imposes some limitations on a state's power to prosecute an individual who has previously been prosecuted for the same offense"

In this case appellant was in effect "sentenced" three times on his narcotic conviction case. Double punishment does of necessity come within the purview of double jeopardy as it is in fact the offspring of double jeopardy.

Appellant was initially "sentenced" to a term of confinement at Atascadero, no period of probation being imposed. He was thereafter given a certificate of discharge therefrom.

In August of 1961, the court long since having lost

jurisdiction to act with respect to the appellant purported on this to impose a probationary status on the same NARCOTIC CONVICTION which he had been discharged from the hospital after being treated successfully.

In March of 1962, after a commitment to state prison on this same conviction, the Court again having lost jurisdiction as provided in Penal Code 1203.2 again attempted to impose another probationary term on this same NARCOTIC CONVICTION.

When appellant was discharged from the hospital, a determination was made by the California Adult Authority after a hearing with respect to the NARCOTIC CONVICTION. It was decided that APPELLANT'S discharge date from his burglary conviction would be extended for six months. This occurred in December of 1960.

When appellant was returned to prison, in September of 1961, at another hearing by the Adult Authority this same NARCOTIC CONVICTION was used as a basis for violating his parole.

The cumulative use of one conviction to sentence appellant several times, on the one hand and the compounded use of the NARCOTIC CONVICTION to violate his parole when said incident had already been administratively adjudicated on the other would certainly necessitate bringing into play the due process clause of the Fourteenth Amendment to afford him the necessary protection.

THE IMPOSITION OF PUNISHMENT AND PENAL CONFINEMENT AFTER A COURSE OF TREATMENT HAD BEEN DECREED AND SUCCESSFULLY COMPLETED WAS CRUEL AND UNUSUAL PUNISHMENT AS PROSCRIBED BY THE EIGHTH AMENDMENT.

In United States vs. Freeman, 357 F 2d 606, the court held that there may not be criminal responsibility for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

In United States vs. Sheller, 369 F 2d 293, where there was a violation of the Internal Revenue Code through failure to report the full extent of amounts earned by a lawyer, the court held that the fact that he was under the care of a psychiatrist at the time of the occurrence required a reconsideration of the case to determine if he lacked the requisite specific intent to establish criminal responsibility.

In Robinson vs. California, 370 U.S. 660, the court in reference to narcotics use held that to make a criminal offense of such a disease would be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In this case while a plea of guilty was entered, extensive psychiatric reports were prepared after a thorough

review of the background and the mental condition of the appellant at the time of the occurrence of the particular offense. On the basis of these reports, the judge determined that appellants mental status was such that he required hospitalization. Appellant was accepted by the director of the hospital and treated for his narcotic addiction. He was discharged subsequently when his progress at the institution appeared to be satisfactory.

To at a later date impose punishment when there probably was no criminal responsibility at the time of the offense and when there was a previous finding of an underlying illness of addiction to narcotics would be cruel and unusual punishment proscribed by the Eighth and Fourteenth Amendments.

VI

THE VIOLATION OF THE PAROLE OF APPELLANT
WAS PREDICATED UPON FALSIFIED DATA VIO-
LATING ALL STANDARDS OF DUE PROCESS.

In Moore vs. Gardner, 250 F. Supp 865, the Court held that all persons before administrative tribunals are entitled to administrative due process, and a decision must be fairly grounded upon the evidence and upon reason.

In Swift and Company vs. United States, 308 F. 2d 849, the Court held due process in an administrative hearing includes a fair trial, conducted in accordance principals of fair play and applicable procedural standards established by law.

In Russell-Newman Mfg. Co. vs. F. L. R. B., 370 F2d 980 (1984), the court said that in administrative proceedings of a quasi-judicial character the liberty and property of citizens must be protected by a fair and open hearing, that such a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and meet their claims.
(emphasis added)

In Lechich vs. Rinaldi, 246 F. Supp. 675, the court said the suppression of any part of the record by administrative agency is a derogation of procedural due process.

In this case, appellant was returned to prison on the NARCOTICS CONVICTION and in violation of his parole for burglary. He was charged with three violations: The NARCOTIC CONVICTION, attempted to escape from a parole officer and possession of Darvon-a dangerous drug. He was not allowed to have counsel at this proceeding. No record or transcription was made of the proceeding itself. The triers of fact were persons who were his accusers. While appellant pleaded "guilty" to the NARCOTIC CONVICTION, previously discussed, he pleaded "not guilty" to the other two charges. No competent evidence was presented at the "hearing" which lasted but a few minutes. Subsequently appellant was notified that he had pleaded "guilty" to all three charges.

It is quite clear that there was in this instance, no attempt whatsoever to have an impartial inquiry, as to whether

appellant had perpetrated any violation of his conditions of parole. The proceeding was completely devoid of the procedural safeguards which have come into being that are acknowledged to assure the rendition of a result that is factually substantiated by some competent evidence. Not even the most rudimentary protections were accorded him. As the result of the "findings" of this hearing, appellants date of discharge already fixed was annuled and reset at the maximum under the indeterminate sentence law.

VII

THE APPELLANT WAS DEPRIVED OF THE EFFECTIVE REPRESENTATION OF COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE IN 1964.

In Lunce vs. Overlade, 244, F 2d 68 (111), the Court held that there was ineffective representation by counsel when the attorney is "so lacking in diligence and competence that the accused is without representation and the (trial) is reduced to a sham."

In Thomaston vs. Gladden, 326 F2nd 305 (307), the court held that one is entitled to a hearing after a plea of guilty to determine if "his representation by his own retained counsel may have been so ineffective as to amount to a denial of due process".

In Turner vs. Maryland, 303 F. 2d 507 (511), the court said that requirement of effective counsel is not satisfied if the lawyer "makes merely a perfunctory appearance and does

nothing whatsoever before or during the (trial) to advise his client or protect his rights".

The court in Schaber vs. Maxwell, 348 F. 2d 664 (669), quoted Ellis vs. United States, 356 U.S. 674, in which it was held "that representation in the role of an advocate rather than that of amicus curiae is required".

In this case counsel was retained solely for the purpose of the probation and sentencing hearing on this particular date. The appellant in fact received nothing whatsoever in the way of representation on his behalf. The portion of the transcript as quoted was not taken out of context for a further reading therefrom shows that appellant who was unlearned in the law; having been virtually abandoned was compelled to address the court himself. This attempt on the part of the appellant to do so in lay terms only served to irritate the court. Certainly the lack of advocacy as occurred in this instance is so blatant and apparent on its face as causes one to wonder whether the appearance of appellants "counsel" was not in fact on behalf of the prosecution.

VIII

THE AMENDMENT OF THE INFORMATION TO
CHARGE AN OFFENSE NOT SHOWN TO EXIST
EITHER BY INFORMATION OR INDICTMENT
AT THE TIME OF ARRAIGNMENT IN SUPERIOR
COURT WAS IN DEROGATION OF APPELLANTS
CONSTITUTIONAL RIGHTS.

In Schnautz vs. U.S., 263 F. 2d 825, the court said that the purpose of an indictment is to inform accused of offense with which he is charged so as to permit him to make his defense, and, if subsequently charged with same offense, to permit him to plead double jeopardy.

In U.S. vs. Schneiderman, 102 F. Supp. 87, the court said one of the purposes of an indictment is to inform the court of facts alleged, so it may decide whether they are sufficient in law to support conviction, if one should be had.

In U.S. vs. McCue, 160 F. Supp. 595, the court held there must be a formal and sufficient accusation against defendant who cannot be convicted without such an accusation even if he voluntarily submits himself to courts jurisdiction.

In Frye vs. Settle, 168 F. Supp. 7, the court held that there can be no conviction or punishment of a crime without a formal and sufficient accusation.

In Sanders vs. Buckhoe, 346 F 2d 558, the court held that a defendant may be charged under an information in lieu of an indictment.

In Russell vs. United States 369 U.S. 749, the court held an indictment may not be amended except by re-submission to the grand jury, unless charge is merely a matter of form.

In Crosby vs. U.S., 339 F 2d 743, the court held that an indictment may not be judicially amended even with defendants consent.

In U.S. vs. Manos, 340 F 2d 534, the court held that an information may be amended so that the allegation charged will conform with the evidence as produced.

It is apparent from these cases that the constitutional protection afforded the accused is to assure the existence of probable cause as to the commission of a particular offense to have to stand trial.

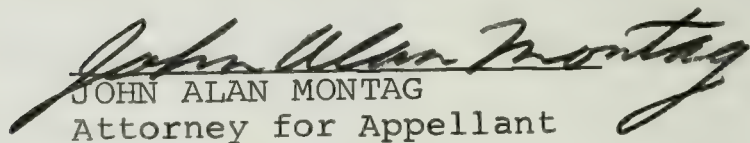
This protection is afforded by both an indictment and information. Nowhere in the information filed at the conclusion of the preliminary hearing is there any indication that there was violation of H. & S. 11,501. There was no evidence presented to a grand jury nor placed before a magistrate. At a preliminary hearing the appellant would have had the opportunity to cross examine witness and submit a defense. Additionally the filing of this count diminished the possibility of obtaining an acquittal on the original charge. It would appear the plea of guilty here was improperly accepted and that any judgments pursuant thereto would be void. It is ludicrous for respondent to argue that appellant was not prejudiced.

CONCLUSION

WHEREFORE, it is respectfully urged that the Order of the court below be reversed in conformity with the applicable decisions herein cited and that the appellant be granted the relief prayed for in his petition for the writ of habeas corpus, and what other relief this Honorable Court may

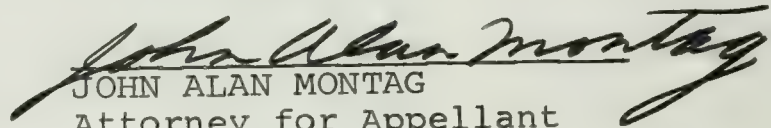
believe is fair and just under the foregoing circumstances.

Respectfully submitted,


JOHN ALAN MONTAG
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JOHN ALAN MONTAG
Attorney for Appellant

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding;

That my business address is 215 West Fifth Street, Los Angeles, California 90013, that on September , 1967, I served the within APPELLANT'S OPENING BRIEF (Fisherman v. Achuff - No. 21598) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, U. S. District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

Thomas C. Lynch, Attorney General
State of California
600 State Building
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September , 1967, at Los Angeles, California.

Signature

Orig. & 20 copies to: United States Court of Appeals
For the Ninth Circuit
United States Courthouse and Post Office Bldg.
7th & Mission Sts., San Francisco, Calif.

No. 21601 ✓

**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

LEONARD MARVIN LUGO,

Petitioner-Appellant

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Respondent-Appellee.

APPELLANT'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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FILED

MAR 15 1967

WM. B. LUCK, CLERK

MAR 20 1967

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No. 21601

**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

LEONARD MARVIN LUGO,

Petitioner-Appellant

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Respondent-Appellee.

APPELLANT'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**STATEMENT OF JURISDICTION OF
UNITED STATES DISTRICT COURT**

This is an appeal by Leonard Marvin Lugo, an inmate of the Oregon State Penitentiary, from an Order of the United States District Court of Oregon denying him a writ of habeas corpus for alleged violation of his constitutional rights resulting in his imprisonment.

Lugo had exhausted his State remedies for post conviction relief under the Oregon Revised Statutes

138.530(1a). *Lugo v. Gladden*, 82 Or Adv Sh 737 414 P2d 324 (1966).

Jurisdiction to hear and determine this case is conferred on the United States District Court under the provisions of 28 USCA, Section 1343(3) which provides: "the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *"

The jurisdiction is further conferred in the United States Constitution under Article III Section 2 concerning jurisdiction to the Federal Courts and all cases arising under the United States Constitution.

JURISDICTION OF COURT OF APPEALS FOR NINTH CIRCUIT TO HEAR THE APPEAL

On November 25, 1966 the District Court entered its opinion and an Order dismissing Appellant's Petition.

Jurisdiction is conferred on this Court to review said Order under the provisions of 28 USCA, Section 1291.

APPELLANT'S STATEMENT OF THE CASE

This is a habeas corpus proceeding. The Appellant

is presently incarcerated in the Oregon State Penitentiary in Salem, Oregon. The Appellee is the warden of the Oregon State Penitentiary.

The basic factual issue is whether or not a confession was taken and used against Appellant without the safeguards protecting his right against self incrimination. The basic error of the District Court was in deciding the Federal decision of *Escobedo v. Illinois* took away the rights that Appellant had prior to June 22, 1964 with respects to the validity and handling of confessions prior to that date. The second claim of error is that Appellant was denied due process of law (1) by Trial Court in original conviction, (2) by State Court in post conviction proceedings under ORS 138.530(1a), and (3) in District Court in review of these proceedings.

This case was submitted to the United States District Court for decision upon motion to dismiss the petition filed by the Respondent and in connection with said motion District Court used the transcript of the proceedings of January 4, 1960, the transcript of the proceedings of June 28, 1965 and Appellant's Abstract of Record and Brief before the Supreme Court of the State of Oregon and Appellant's Reply Brief before the Supreme Court of the State of Oregon.

The District Court found that the case of *Escobedo v. Illinois*, 378 US 478 (1964) could not be applied to a trial completed in January of 1960 under the

authority of *Johnson v. New Jersey*, 384 US 719 (1966). Appellant is not quarreling with this finding. However, the rules relating to confessions as they existed prior to June 22, 1964 were not taken away by this decision.

The Court then found that the Appellant was not intoxicated to the extent that his statement was inadmissible and that the trial court had given him the opportunity to challenge the voluntariness of the statement outside of the presence of the jury.

QUESTIONS BEFORE THE COURT ON APPEAL

As the Appellant was denied a trial or hearing in the District Court on the merits of his petition, it is necessary to comb the previous proceedings in order to consider the propriety of the Court's rulings. The first question that would be presented would have arisen at the trial of the original case of January 4, 1960. Were the safeguards against involuntary incrimination followed? Petitioner submits they were not.

A subsidiary question would be raised, if there is an issue of fact, was the Appellant denied a proper hearing in the District Court?

The next question would be whether or not by misapplication of the case of *Escobedo v. Illinois*, was the Appellant denied relief to which he was otherwise entitled?

The Appellant is here contending that a confession was taken from him while he was suffering from in-

toxication and the after affects thereof after he had requested and had been denied rest, and, when he made said statement in order to obtain rest, in addition to the denial of his right to counsel and his right to remain silent. In this regard he is conceding that the rights set forth in the *Escobedo* case, this is, that he be advised of his rights to counsel and his rights to remain silent would not be sufficient by themselves to afford him relief, but that the physical condition and coercion of the Appellant in addition to these facts rendered his confession involuntary under the pre-existing Oregon law, and such facts should have been determined by hearing out of the presence of the jury in accordance with Oregon law.

ASSIGNMENT OF ERROR

The District Court erred in dismissing Appellant's petition for writ of habeas corpus.

POINTS AND AUTHORITIES

Point 1

The Court erred in finding there was no intoxication or coercion making Appellant's confession involuntary.

Authorities

Unsworth v. Gladden, U.S.D.C. (Ore) decided
12/27/66

United States Constitution, Amendment V
Holland v. Gladden, 226 Fed Supp 654, 655-656
Davis v. United States, 32 F2d 860, 863

Point 2

The Court erred in the finding that because *Escobedo v. Illinois* did not apply at the time of the trial of this case that Appellant was not entitled to a hearing out of the presence of the jury on the question of voluntariness of confession and to have an involuntary confession excluded.

Authorities

State v. Bouse, 264 P2d 800, 811, 199 Or 696
State v. Brewton, 344 P2d 744, 749, 220 Or 266
State v. Brewton, 395 P2d 874, 880, 238 Or 590
State v. Ely, 390 P2d 348, 349, 237 Or 329
State v. Linn, 173 P2d 305, 309, 179 Or 499
State v. Nagel, 202 P2d 640, 653, 185 Or 486
State v. Nunn, 321 P2d 356, 361, 212 Or 546

SUMMARY OF ARGUMENT

The Trial Court found a dispute upon the evidence of intoxication of the Appellant at the time of the alleged confession thereupon ruled that the Appellant was not sufficiently intoxicated to render his statements inadmissible. (R 12-14) In doing this the Court failed to consider the Appellant's contention that by virtue

of his condition his confession was coerced thereby rendering it involuntary and inadmissable.

The Court further found that the Appellant was offered an opportunity of hearing outside of the presence of the jury on the question of voluntariness (R 15) whereas in fact the trial transcript reveals that the testimony relating to the confession was heard in the presence of the jury, over the objection of the Appellant, and the confession was admitted in evidence before Appellant was given the opportunity to rebutt the admissability of such confession—of what effect would be the Appellant's denial out of the presence of the jury?

Appellant is now contending that the District Court finding that *Escobedo v. Illinois* did not apply retroactively, dismissed Appellant's petition, overlooking the evidence and merits of Appellant's contention as it would have applied prior to *Escobedo v. Illinois*.

The difficulty of this appeal is that the contentions of the parties are found in a jumbled mass of testimony and exhibits as Appellant was not given a trial on the issues presented to the District Court and to this Court. The most orderly proceeding would be a reversal, grant the Appellant a hearing in the trial court, or if this Court is able to consider the testimony and exhibits, a reversal on the merits.

ARGUMENT

Point 1

The Appellant was intoxicated and while in such condition was coerced into giving an involuntary confession. Transcript of Proceedings, January 4, 1960 Tr. 1-4-60 P. 235.

Q. Now, let's come down to the day in question, that was the 31st day of last August, August of 1959. Can you tell us whether you were here in Klamath Falls on the morning of that day?

A. Yes.

Q. Whereabouts in town were you?

A. At what time? Just in the morning?

Q. Well, when you first came downtown that morning?

A. Well, I went to Vern's Tavern.

Q. And by the way, where is Vern's Tavern?

A. It is on Seventh and Main, I believe.

Q. And how long were you there?

A. Oh, about ten minutes.

Q. Did you have anything to drink while you were at Vern's Tavern?

A. One bottle of beer.

* * *

(Tr. 236)

Q. The two of you went together to the Office?

A. Yes, we did.

Q. And about what time of day was it then?

A. It was about 9:00 o'clock.

Q. What did you do after you got to the Office?

A. Well, we proceeded to drink.

Q. You say you proceeded to drink?

A. Yes.

Q. Now, we are not interested in how much this friend of yours drank, but how long did you continue to drink there?

A. Well, until I found my brother, I mean my brother found me.

Q. Well, can't you give us about the time in hours?

A. Well, the first time I had seen him was about 1:00 o'clock I believe in the afternoon.

Q. In other words, Mr. Lugo, from the time that you went in there, and I think you said that was around 9:00 o'clock or thereabouts?

A. That is right.

* * *

(Tr. 238)

Q. Now, up to that time can you give the jury a fair estimate of how many drinks you had had?

A. Well, I can't give a correct estimate. Oh, it was an awful lot.

Q. And what had you been drinking?

A. Well, I was drinking whiskey.

* * *

(Tr. 240)

Q. Now, where did you go after you left your brother?

A. I went directly to the Office.

Q. Back to the bar?

A. Yes.

Q. What did you do after you got there?

* * *

A. I ordered something to drink.

Q. What did you order in the way of drinks?

A. It was a shot of whiskey.

* * *

(Tr. 257)

Q. Mr. Lugo, after the incident that you just related what did you do?

A. Well, I continued to stay in the Office and drink. And I was—well, a certain instinct I guess of some kind, a person can tell when a man is serious about doing great bodily harm or killing him, I just sensed that.

* * *

(Tr. 265)

Q. And where did you go?

A. I went back to the Office.

Q. What did you do when you got back to the Office?

A. Well, I ordered some more drinks, some more whiskey to drink.

Q. Can you tell us about how many drinks you had on the occasion of that visit?

A. Well, no I couldn't say for sure.

Q. Well, could you give us an idea, Mr. Lugo?

A. No, I couldn't even say that.

Q. How long did you remain at the Office on that occasion?

A. Oh, I would say approximately fifteen minutes or half an hour, something like that.

* * *

(Tr. 268)

Q. What did you do after you got in there?

A. Well, we went and sat down at the bar and had a drink.

Q. What did you drink there?

A. Well, I was drinking whiskey. I don't recall what he had to drink.

Q. Did you have just one drink or more?

A. I believe it was only one, I am not sure.

Q. Now, how long were you in the Office on that occasion, if you know?

A. I don't really know.

Q. About what time of day was it then?

A. Well, at that time I thought it was about 10:30 or 11:00 o'clock at night.

* * *

(Tr. 269-270)

Q. What did you do when you got to Skeet's Tavern?

A. Well, we sat down.

Q. Pardon?

A. We went in and sat in a booth.

Q. Did you have something to drink in there, Leonard?

A. I ordered some beer, yes.

Q. When you say you ordered beer, you mean you were the only one that drank there?

A. No, I ordered beer for everyone.

Q. And do you know how long you were in Skeet's?

A. Well, it wasn't very long.

Q. Do you remember how many beers you had?

A. I believe I drank about half a bottle and that was all. I don't know for sure.

* * *

(Tr. 275-276)

Q. Now, you say that prior to one o'clock, Mr. Lugo, on the 31st of August, '59, that you had drank an awful lot; I believe that is the way you put it.

A. Yes, sir, that is right.

Q. And I assume that you were quite intoxicated by one o'clock were you not?

A. Well, I wasn't drunk at that time, but I couldn't feel the alcohol, yes.

Q. Did you know what you were doing at all times at that time?

A. What do you mean?

Q. Well, did you know what you were doing? Did you know everything that was going on about you?

A. Yes, quite well.

Q. And by the time that Martinez beckoned you over after you had gone into Skeet's Tavern, I assume by that time you were quite drunk, were you not?

A. I was.

Q. And as a matter of fact you were so drunk that you did not know what you were doing? Is that what we are to understand?

* * *

(Tr. 277)

A. I was drunk, yes.

* * *

(Tr. 287)

"Did you make that statement to Mr. Goakey?

- A. Well, I wouldn't deny it. I don't remember it.
Q. Because you were drunk and in a state of shock?
A. Yes, sir.

* * *

(Tr. 306)

- A. I was drunk, yes.
Q. So drunk you don't know what you're doing?
A. I was drunk.

* * *

(Tr. 358-360, from the testimony of Mr. Loyal Johnson)

- Q. What time of day, or approximately what time of day did you first see him on August 31st?
A. It was approximately ten o'clock in the morning.
Q. And where did you see him, Mr. Johnson?
A. In the bar.
Q. Will you tell us what he was doing in there? What was his apparent purpose in being there?
A. He was just having a drink or so.
Q. Now then, Mr. Johnson, could you give us an idea of how long Mr. Lugo remained in your place after he first came in that morning?
A. He was in there off and on all day until a quarter after five when I went off shift.
Q. I'm speaking now about the morning. He was in and out, wasn't he?
A. Yes.
Q. A number of times. Perhaps you don't know, possibly you do, but if you do know about how long he remained in there—
A. If I remember correctly the first time he was in

there he was in there from ten in the morning until probably two in the afternoon.

Q. And can you tell us what he was doing during that time?

A. He was drinking.

Q. Do you remember what kind of drinks he was drinking?

A. I believe that he was drinking vodka collins.

Q. Anything else to your recollection?

A. Later in the afternoon he drank some whiskey.

Q. Now, how many times, or approximately how many times would you say he left your place between the time that he first came in this morning and two o'clock in the afternoon?

A. I don't think he left over once from the time he came in until 2:00 o'clock in the afternoon.

Q. Do you know the occasion of his leaving that one time? Do you know why he did?

A. No.

Q. I think you say he next came in about 2:00 o'clock in the afternoon?

A. No. The second time that he left was about 2:00 o'clock.

Q. Oh, the second time that he left. Well now, how long, or approximately how long had he been in your place before he left the second time?

A. He left for a few minutes around twelve o'clock, and came back in a little after twelve. And then he was there till approximately two o'clock.

Q. Uh-huh. And what was he doing during this period of time between twelve and two when he was in the bar?

A. He was just sitting at the bar drinking.

* * *

(Tr. 364)

Q. I see. And he was gone for about how long?

A. I would judge about an hour.

Q. Then did he come back?

A. Yes.

Q. And about how long did he remain in your establishment that time?

A. He stayed there about another hour.

THE COURT: Who stayed there?

THE WITNESS: Lugo stayed there.

Q. And what was he doing during that period?

A. He was drinking.

Q. Do you know what he was drinking?

A. He was drinking whiskey then.

Q. Now, that would bring us down to about what time of day?

A. About four o'clock then. He stayed until about four o'clock.

Q. What hours do you work there?

A. I was working 8:30 to 5:00. About twenty minutes after five I got off.

* * *

(Tr. 366)

Q. I see. Let me ask you this, was the defendant drunk the last time you saw him?

A. Not visibly, no.

Q. Was he sober?

A. Well, as far as a yes or no question to that, why, it would be pretty hard to answer in that case.

Q. Well, give me a yes or no answer, will you?

A. Well, no, he wasn't staggering drunk, no.

Q. Was he sober?

A. After having drank as many drinks as he drank—

Q. Just answer the question yes or no, will you?

* * *

A. No, he wasn't drunk.

Q. Now, was he sober?

A. I already said he wasn't drunk.

* * *

(Tr. 368)

Q. Now, Counsel asked you if Mr. Lugo, the last time you saw him, was drunk or sober. First he asked if he was drunk, and you said not visibly. Now, what did you mean by that, Mr. Johnson?

A. Well, Lugo drank in there considerably, and could drink an awful lot and never show he had been drinking is why I put it that way. And he never got out of line in all the times he was there, or I never heard of him getting out of line drinking. Consequently, it was a hard question to answer yes or no.

Q. In other words, Mr. Johnson, I understand from your testimony that it might have been difficult to know—

A. That is correct.

Q. Whether or not Mr. Lugo was drunk or sober?

A. That is right.

* * *

(Tr. 370)

MR. STEARNS: Oh, just one question, please, Mr. Johnson. I wonder, I am just wondering if you

could tell us approximately how many drinks of intoxicating liquor Mr. Lugo consumed in your place that day?

THE WITNESS: Well, that would be pretty hard to say.

MR. STEARNS: Well, just the best you can.

THE WITNESS: I imagine during the course of the day he probably had ten drinks.

MR. STEARNS: That would be whiskey and other intoxicating liquors?

THE WITNESS: Yes.

* * *

(From the Transcript of Proceedings June 28, 1966, Page 10.)

Q. Now, when Mr. Goakey came in, can you just tell the Judge, to the best of your recollection, what, if any, conversation took place between yourself and Mr. Goakey at that time.

A. When he first came in the room, he asked the officer to remove the handcuffs that I still had on and he introduced himself, where he worked, and then he—I told him right then that—I asked him right then if I could get some rest, I told him that I was tired and I was kind of sick, and he offered me a cup of coffee after I told him that, and I accepted it and I told him that I was feeling pretty bad, that I'd like to get rest, I don't know how many times, and he said, "Well, don't you think you'd feel better if you talked about this," and I told him, "No," I said, "I'm tired, I'd like to go to bed, that is all I want, that is the only important thing to me now." So, I was answered with just what started to be an interrogation by him and—

Q. Prior to the time that any interrogation took place, other than what you have testified to here, Mr.

Lugo, did Mr. Goakey advise you that you had a right to remain absolutely silent?

A. No, he didn't.

Q. That was a constitutional right that only you could waive—

MR. LEWIS: Oh, I thought this was a statement, I withdraw my objection.

Q. (BY MR. VANDENBERG) Did he advise you of this?

A. No, he didn't.

Q. Did Mr. Goakey advise you that you had a right to have counsel's aid and assist you in the interrogation that was to take place?

A. No.

In this case had the District Court have considered the above testimony it would have found the testimony of intoxication far in excess of that in the case of *Unsworth v. Gladden* rendering the confession inadmissible by reason of intoxication and coercion. The Appellant contends that the above testimony shows coercion contrary to the Fifth Amendment of the United States Constitution "no person * * * shall be compelled in any criminal case to be a witness against himself * * *"

That an involuntary confession is inadmissible whether rendered involuntarily by reason of intoxication or coercion or both is without question. Circumstances which may render a confession involuntary are as diverse as the cases coming before the Courts.

In the case of *Davis v. United States*, 32 F2d 860, 863, the taking of an accused to a morgue, without promises or threats, was held such as to render a confession inadmissible being improperly coerced.

In this case we have a Defendant, a semi-illiterate Indian, under the influence of intoxicating liquor after having consumed intoxicating liquor for an entire day suffering from the affects thereof and after affects and from the shock of a trauma, forced to remain upright subjecting himself under these circumstances to the questioning of a skilled and trained adversary without any safeguards provided by law.

That such a confession would have been inadmissible prior to June 22, 1964 Appellant cites *Holland v. Gladden*, 226 F Supp 654, 655 (1963). In this case a Defendant was arrested on suspicion of many crimes whereas he admitted to the crime of burglary he was held and questioned with respects to the crime of rape and after repeated questioning gave a confession which was used against him in his conviction of the latter crime. "The actions of the police show a flagrant disregard of those procedural safeguards guaranteed all suspected criminals by the due process laws of the Fourteenth Amendment. The law enforcement officer did not warn petitioner of his Constitutional right to remain silent. In fact, they strongly implied—by words and actions—that petitioner was required to answer

questions put to him by the Sheriff and other police officers. * * *

ARGUMENT

Point 2

Not only was the confession taken under highly questionable circumstances as set forth in Point 1, but the safeguards bearing on the issue of voluntariness were not followed at the trial thereby denying Appellant the protection of this constitutional amendment. The District Court, in its opinion, stated "Lugo in his memorandum of authorities filed with this Court on July 25, 1966, asserts that his constitutional rights were deprived him because the trial court failed to hold a hearing outside the presence of the jury on the issue of voluntariness of his confession. There is no merit in this contention. The trial judge gave Lugo's lawyers an opportunity to present testimony about the statement's voluntariness in a hearing outside the presence of the jury. When the defense attorneys declined that opportunity, the judge admitted the statement."

This is not borne out in the Transcript of Testimony of the trial of January 4, 1960.

(Tr. 102)

Q. Now did anybody while you were present, did anybody threaten the defendant with physical violence to get him to sign that exhibit?

MR. STEARNS: Just a moment, I am going to object to that, your Honor, at this time. I would like

to call your honor's attention to a rule that is laid down in *State v. Bouse*, 199 Or.; and would at this time, your Honor request a brief recess in order that we might discuss this matter before proceeding.

THE COURT: The jury will retire to the jury room.

(Thereupon the jury retired to the jury room.)

MR. STEARNS: 199 Ore. at page 676, 700 and 701 your Honor. That was an opinion by the late Justice Tooze.

THE COURT: I remember it. Some years ago, wasn't it?

MR. BEDDOE: I believe it was. I think it was.

THE COURT: What is your point? I have this marked.

MR. STEARNS: If your Honor please, the point is simply the question of the admissability of the alleged confession in the first instance is the matter for the determination of the Court, and that the better practice, as indicated in that decision, is to hold that inquiry out of the presence of the jury.

MR. BEDDOE: Of course, it hasn't been offered yet, your Honor. This is all a preliminary matter, and this just merely goes to the signing of the statement. It hasn't been offered.

THE COURT: I know it hasn't. I didn't say it had.

MR. BEDDOE: I think Counsel is getting a little hasty.

MR. STEARNS: I don't think so, your Honor, because it would be too late if we wait until the witness says yes, he signed it voluntarily and without compulsion.

MR. BEDDOE: That matter is also for the jury.

THE COURT: This *Bouse* case was determined

by the Supreme Court in 1953, December of 1953.

MR. STEARNS: That is right, your Honor.

THE COURT: And the new rule on admissions and confessions wasn't passed by the legislature until after that. That would make little difference here, as far as the qualifications, the preliminary work. But is it your point that no questions shall be asked about a confession or an admission in the presence of the jury?

MR. STEARNS: No, not necessarily, your Honor. But I understand that from the *Bouse* case, and from others as well, the case of *State v. Linn* which is cited in the *Bouse* case, that the better practice is recognized by the Supreme Court, is in the first instance that the Court hear and determine the admissibility, the question of the admissibility of the alleged confession out of the presence of the jury.

MR. BEDDOE: The fact is we aren't at the present time offering it.

MR. STEARNS: But you are.

MR. BEDDOE: I am just having it identified.

MR. STEARNS: No, you went beyond that, if you will go back—

MR. BEDDOE: Oh, yes, that is right. But the question of what was done at the time it was signed, I mean it is an inquiry that must go before the jury.

MR. STEARNS: The question, the specific question, your Honor, I objected to, was when Counsel asked in effect whether the signing of the alleged confession was voluntary.

MR. BEDDOE: All of it is what we are leading up to, yes.

MR. STEARNS: Yes. I think the Court probably—I am not saying the Court is bound to do it, but I say I believe that the better practice is for the Court to hear the facts surrounding the taking of the

alleged confession out of the presence of the jury in the first instance. That is my point.

MR. BEDDOE: It is going to have to go to the jury sometime.

THE COURT: Just how could that be done?

MR. STEARNS: It could be done right now, if your Honor please, out of the presence of the jury, and let the Court determine whether or not the Court finds that the alleged confession is admissible.

THE COURT: Is that your point right now?

MR. BEDDOE: I am merely showing that the signing of this particular exhibit was done without threats, coercion and so forth. That is my only purpose right at this time. Lt. Huff was not present when the confession was made. He was merely present when it was read by the defendant, signed by him, initialed and some corrections made.

MR. STEARNS: I think I have made my position clear.

THE COURT: Yes. The Court isn't going to bar you from the ordinary questions and answers. It is after the offer is made, after that offer is made that the question arises and probably should be taken care of in the absence of the jury.

MR. BEDDOE: That is the way we have always done it in the past.

MR. STEARNS: It isn't necessary to note an exception, but I have gotten in the habit of doing that.

THE COURT: You have your exception. Bring in the jury.

(Thereupon the jury resumed the jury box.)

MR. STEARNS: If your Honor please, before the question is answered may it be read back, because I am not sure I got the question.

THE COURT: All right, yes. Repeat the last question.

(Thereupon the question was read as follows: "Now, did anybody while you were present, did anybody threaten the defendant with physical violence to get him to sign that exhibit?")

MR. STEARNS: Well, if your Honor please, that raises the further objection that the witness was not present when the statement was taken, so he wouldn't be qualified to answer that question.

MR. BEDDOE: I asked him to get him to sign.

THE COURT: It is the signing. Read the question again.

(Thereupon the question was re-read by the reporter.)

THE COURT: Objection is overruled.

MR. BEDDOE: Go ahead and answer, Lieutenant.

After this initial reference to the Appellant's confession in the presence of the jury over objection by Appellant, further testimony was taken.

(Tr. 199-204)

BY MR. BEDDOE

Q. Will you state your full name, please?

A. Ortis W. Goakey.

Q. Where do you reside, Mr. Goakey?

A. I am now living on Clinton Avenue, No. 4607, Klamath Falls, Oregon.

Q. What is your occupation?

A. I am deputy district attorney for Klamath County, Oregon.

Q. And were you so engaged on the 31st day of August, 1959?

A. I was.

Q. Now, calling your attention to the evening hours of that date, did you have occasion to receive a call with reference to a killing behind the Broiler restaurant in Klamath Falls?

A. I did.

Q. And what did you do with reference to that call?

A. I went to the scene of the crime.

Q. What time did you arrive at the scene of the crime?

A. Approximately 7:30 p.m.

Q. Who was present, Mr. Goakey, when you arrived there?

A. Officer Dennis Lilly of the City police, I saw Officer Mattmiller of the city police, Bill Kendall of Ward's Funeral Home. I saw Detective Archie Huff of the city police. Subsequently I saw Officer Gerleve of the city police; I saw the defendant in this case, Mr. Lugo.

Q. Do you see him present in court?

A. Yes, I do.

Q. Would you point him out, please?

A. Yes. He is sitting next to Mr. Ramirez in the dark suit at the counsel table. And I saw his brother, Al Lugo, and these may have been some others, I can't recall at the moment.

Q. When you arrived at the scene of the crime was there anyone present with the exception of the defendant and his brother who was not an officer and had some official capacity there?

A. Not that I can recall.

Q. Now, what, if anything, did you do after arriving

THE COURT: All right, yes. Repeat the last question.

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A. Yes. He is sitting next to Mr. Ramirez in the dark suit at the counsel table. And I saw his brother, Al Lugo, and these may have been some others, I can't recall at the moment.

Q. When you arrived at the scene of the crime was there anyone present with the exception of the defendant and his brother who was not an officer and had some official capacity there?

A. Not that I can recall.

Q. Now, what, if anything, did you do after arriving

at the scene of the killing?

A. Well, I asked one of the officers, and I don't recall which one it was for sure, what had happened briefly, and I examined the scene of the killing.

MR. RAMIREZ: Now, if the Court please, I object to the conclusion of the witness.

MR. BEDDOE: Don't use the word "crime", Mr. Goakey, use the word "killing".

THE WITNESS: Well, I examined the scene there.

Q. What did you do after you had examined the scene?

A. I went to the Klamath Falls City Police Department.

Q. And what time did you arrive there, approximately?

A. Oh, approximately ten minutes to eight.

Q. Did you see the defendant there?

A. Yes, I did.

Q. And where was that?

A. He was in one of the detective's rooms.

Q. Was he handcuffed at the time you first saw him?

A. I believe that he was when I first saw him.

Q. What, if anything, did you do with reference to those handcuffs?

A. I asked the officer to remove the handcuffs.

Q. Did you have occasion to talk to the defendant at this time?

A. Yes, I did.

Q. And who was present when you talked to him?

A. Just the defendant and myself.

- Q. Did you discuss this shooting with him?
- A. Yes, I did. I asked him what happened.
- Q. Did he tell you?
- A. Yes, he did.
- Q. Was this subsequently reduced to writing?
- A. Yes, it was.
- Q. And by whom?
- A. By our stenographer Ruth Krider.
- Q. When did she come in?
- A. After the defendant had related to me what had happened, I then called her in in order to have him tell it to me again so it could be reduced to writing.
- Q. When he made this statement who was present when Mrs. Krider reduced the thing to writing?
- A. Just the defendant, Mrs. Krider and myself.
- Q. Was the defendant threatened with physical force to make this statement?
- A. No, he was not.
- Q. Was the defendant offered any reward for making this statement?
- A. No, he was not.
- Q. Was the defendant threatened orally to get him to make this statement?
- A. No, he was not threatened orally.
- Q. Was the defendant offered any immunity from prosecution in order to get him to make this statement?
- A. No, he was not.
- Q. Mr. Goakey, I will hand you what has been marked State's Exhibit T for identification and ask you

to examine it carefully, please.

(Witness complies.)

Q. What is that?

A. This is a written statement that the defendant gave us at that time and place.

Q. And was that statement transcribed from shorthand notes?

A. Yes it was.

Q. And from whose shorthand notes?

A. Those of Ruth Krider.

Q. Do you see any signatures appearing thereon?

A. Yes, I do.

Q. And whose signatures appear?

A. The signature of the defendant, Leonard Marvin Lugo, and those of Lt. A. W. Huff, and Ruth Krider.

Q. Were you present when those signatures were placed there upon that exhibit?

A. Yes, I was.

Q. Was the defendant given a full opportunity, and did he read that statement prior to signing it?

A. Yes, he did.

Q. Now, I notice there are also certain corrections or deletions made in that exhibit. Who made those?

A. The defendant.

Q. Were they initialed by the defendant after making them?

A. Yes, they were.

Q. Did you see the defendant do so?

A. Yes, I did.

Q. And I notice that at the end of each page there are initials. Whose initials are those?

A. Those are the initials of the defendant.

Q. Who put those there?

A. The defendant, Mr. Lugo.

Q. And did you see him do so?

A. Yes, I did.

MR. BEDDOE: At this time, your Honor, I would offer State's Exhibit T for Identification into evidence.

MR. STEARNS: If your Honor, please, I think the offer is premature. I understand the rule to be that an offer of that character will be withheld until all of the testimony concerning the taking of the statement is before the Court.

THE COURT: Let me see the statement.

MR. BEDDOE: Yes.

(Handing same to the Court.)

THE COURT: The Court will withhold—

MR. BEDDOE: All right, fine.

and followed by testimony resulting in admission of the exhibit.

(Tr. 214-223)

BY MR. BEDDOE:

Q. Will you state your full name, please?

A. Ruth Krider.

Q. And where do you reside, Mrs. Krider?

A. 1507 Carlson Drive, Klamath Falls, Oregon.

Q. You are employed, are you not?

A. Yes, I am.

Q. And where do you work?

- A. I work in the office of the Klamath County District Attorney.
- Q. And how long have you worked in the District Attorney's office?
- A. Since May, 1957.
- Q. What is your job in the district attorney's office?
- A. I am the legal stenographer.
- Q. Now, are you acquainted with the defendant in this case, Leonard Marvin Lugo?
- A. Yes, I am.
- Q. If you see him in court would you point him out, please?
- A. Yes, he is the gentleman in the dark suit to Mr. Ramirez's right at the counsel table.
- Q. Now, calling your attention to the 31st day of August, 1959, did you have occasion to see Mr. Lugo during the evening hours of that date?
- A. I did.
- Q. Where was that?
- A. That was at the Klamath Falls City Police Station.
- Q. Do you know what room?
- A. It was a private room that the city detectives use.
- Q. I see. And who was present at the time you saw Mr. Lugo there?
- A. Mr. Goakey, the deputy district attorney, and Lt. Archie Huff of the city police and myself.
- Q. How long did Mr. Huff remain there?
- A. Mr. Huff was there during the entire,—while the statement was being taken.
- Q. Are you sure about that?
- A. To the best of my knowledge. He may have left

the room, but to the best of my knowledge he was there. I had my back to him, and naturally I can't be real certain.

Q. I see. Now, what did you do with reference to the statement given by Mr. Lugo?

A. I took it down in shorthand and transcribed it immediately on a typewriter over there.

Q. What did you do with it after you transcribed it?

A. Then I took it back into the room where Mr. Lugo was sitting, and Mr. Goakey and Lt. Huff, and stayed there while the defendant read the statement, initialed the pages, and signed it.

Q. I will hand you what has been marked State's Exhibit T for Identification and ask you if you recognize it?

A. Yes.

Q. What is that?

A. This is the transcript of the statement taken from Mr. Lugo.

Q. And are there any signatures appearing thereon?

A. Yes, on the last page Mr. Lugo signed, and Lt. Huff and I signed as witnesses.

Q. Were you present when the defendant signed that?

A. Yes.

Q. Were you present when he read it?

A. Oh, yes.

Q. I notice there are certain initials at the bottom of each page. Were you present when those were put there?

A. Yes, I was.

Q. Who put those there?

A. The defendant, Mr. Lugo.

Q. I notice there are certain corrections running through the statement. Were you present when those were made?

A. Yes.

Q. And who made those?

A. Mr. Lugo when he read those.

Q. At the time this statement was taken in shorthand by yourself did anybody threaten the defendant with physical force to get him to make this statement?

A. No.

Q. Did anybody threaten the defendant orally to get him to make this statement?

A. No.

Q. Did anybody offer the defendant any immunity from prosecution to get him to make this statement?

A. No.

Q. Did anybody offer the defendant any reward to get him to make this statement?

A. No.

Q. Was the defendant advised of his rights prior to the making of this statement?

A. Yes, he was.

MR. STEARNS: If your Honor please, of course I don't know what Counsel means by that. What was said?

Q. Do you remember if Mr. Goakey said anything to the defendant prior to the time you started taking the statement down?

A. Yes.

Q. With reference to his rights?

A. Yes.

Q. Would you relate to the jury what you remember Mr. Goakey said to the defendant with reference to his rights prior to taking the statement?

A. Mr. Goakey advised him he did not have to make the statement if he did not want to; and he also advised him that if a statement was taken it could be used against him if there was any further prosecution.

MR. BEDDOE: At this time, your Honor, I would reoffer State's Exhibit T for Identification into evidence.

THE COURT: Objection?

MR. STEARNS: We will object at this time, your Honor. I think all of the evidence should be in. I think that is the—

MR. BEDDOE: Mr. Stearns has a rather short memory. Archie Huff has already identified it.

MR. STEARNS: Oh, well, the defendant has not been on the stand.

THE COURT: Well, now, there is only one thing, and that is the notes from which that transcript was made.

MR. BEDDOE: Of course by Oregon law the defendant adopts whatever statement he reads and signs as his, so the notes really would not be important unless the Court would rather have both read into record.

THE COURT: I thought there was another objection to this.

MR. STEARNS: There was, your Honor, which we have discussed privately in chambers.

THE COURT: Well, I know. But unless that is brought out I have no record of it, you see.

MR. STEARNS: We certainly object, your

Honor, to the introduction of this statement in its present condition. There are certain corrections and deletion.

THE COURT: All right, what are they?

MR. STEARNS: Well, I can tell your Honor on what pages they appear.

THE COURT: Just have Counsel come up here. You can have the defendant come too, as far as that goes.

(Thereupon Counsel and the defendant approach the Bench.)

THE COURT: State the deletions you are referring to.

MR. STEARNS: Yes. This doesn't matter (indicating).

THE COURT: All of the deletions made by the defendant you want obliterated so they cannot be read?

MR. BEDDOE: Yes, I would agree to that.

THE COURT: Well, I can take care of that, someone can take care of that.

MR. BEDDOE: I would stipulate that the Court do it.

THE COURT: Is that stipulated?

MR. STEARNS: Yes, I would be glad to stipulate the Court do that or have it done.

THE COURT: Is that the objection?

MR. RAMIREZ: If the Court please, there would be a further objection to that, in that the witnesses who testified relative to this statement testified they all saw the defendant between an hour or an hour and a half. One witness, Mr. Huff, testified that it was after 9:00 o'clock, he remembers definitely it was after 9:00 o'clock, but he doesn't recall the time.

The rest of the witnesses have testified it was an hour after the alleged incident.

MR. BEDDOE: What Counsel is forgetting, your Honor—

MR. RAMIREZ: Let me finish. No one has testified as to what happened to the defendant relative to between the scene and the hour at which the statement was taken. being from an hour to an hour and a half later. Now of course the statute, of course, requires that it was not made under the influence of fear produced by threats. If the Court would look at one portion of that statement there it shows at least an implied threat. Does the Court have the statement there? I think the statement itself shows an implied threat. That would be on page six right there (indicating).

MR. BEDDOE: Yes, I would invite the Court to read that too. Remember, Alfred Lugo was not the defendant.

(Court reads statement.)

THE COURT: Is that the only point?

MR. RAMIREZ: Well, there is the one hour or hour and a half that is missing that is not accounted for—

MR. BEDDOE: May I comment on that?

MR. RAMIREZ: —during which the State has not accounted for. Yet they have it in their power to account for it as to whether or not threats were made to the defendant during that time.

MR. BEDDOE: May I comment on that?

THE COURT: Yes, go ahead.

MR. BEDDOE: The statement was made, your Honor, I think at eight something, and it had to be transcribed. And then it was signed apparently sometime around nine after it had been transcribed. And the Court can see it is a fairly lengthy statement.

THE COURT: This was a statement made to the brother. Any further objections?

MR. STEARNS: Well, if your Honor please, I think I have already made the objection that I think the offer is premature. I think both sides should be heard from before the Court rules on the offer.

THE COURT: Of the confession?

MR. STEARNS: On its admissibility, yes.

THE COURT: Although that would be done in the State's case in chief?

MR. STEARNS: Pardon?

THE COURT: A confession is admissible in the State's case in chief.

MR. STEARNS: Well, if that is the ruling.

THE COURT: I have never ruled different than that.

MR. STEARNS: If that is the ruling of the Court we simply would have to rest upon our exception, your Honor.

THE COURT: Yes, you may have an exception. The Court is going to obliterate the portions of this statement in accordance with the understanding we had in chambers, and it is only that portion that was stricken by the defendant. Now, you all had better be here. I think someone from each side should be here while I do this.

MR. BEDDOE: I would certainly trust the Court to do it.

THE COURT: I don't want to do anything that shouldn't be done.

(Thereupon the Court marked on the exhibit.)

THE COURT: I will instruct the jury right now to refrain from reading anything under the markings I have made here, not to read anything or try

to read anything that is under there. I am striking it out for that reason so you won't read it. You gentlemen can look it over.

(Thereupon respective Counsel examined the exhibit.)

MR. STEARNS: I think your Honor has already instructed the jury that the deleted matter is not at all a part of the statement.

THE COURT: Yes. I will show them if you want me to.

MR. STEARNS: Yes.

THE COURT: Members of the jury, there are spots through this statement—you see that black? See it there, there, there, there, there, there and there, (indicating). Don't try to read what is underneath that, will you? That is why I scratched it out.

MR. BEDDOE: Is it admitted now?

THE COURT: Yes.

MR. STEARNS: And would your Honor specifically instruct that the deleted matter is not at all part of the statement?

THE COURT: Yes, it is no part of the statement at all. That is why I have deleted it.

MR. BEDDOE: That is a matter that has been corrected by the defendant himself.

THE COURT: That was corrected by the defendant prior to his signing.

MR. BEDDOE: Yes.

MR. STEARNS: Yes.

(Thereupon State's Exhibit T for identification was RECEIVED in evidence.)

MR. BEDDOE: I have no further questions of this witness.

THE COURT: Cross examination.

MR. STEARNS: No cross examination.

MR. BEDDOE: At this time I would ask the Court's permission to read the statement of the defendant to the jury.

THE COURT: Yes.

MR. BEDDOE: May Mrs. Krider be excused?

MR. STEARNS: I think maybe she should, your Honor, although of course we have our running objection, you know.

THE COURT: Yes.

MR. STEARNS: I do object.

THE COURT: Yes. You may have an exception to every ruling I have made.

After admission of the confession out of the presence of the jury the Court withdrew the confession and offered the Appellant the following hearing.

(Tr. 225)

THE COURT: The Court is going to set aside its order admitting Exhibit T in evidence, and the Court is doing this so that there will be no question as to the defense of offering testimony if they so desire relative to the voluntariness of the statement.

MR. STEARNS: Thank you.

THE COURT: Do you have any testimony to offer relative to the admission of Exhibit T?

MR. STEARNS: Well, if your Honor please, now that puts us in something of an embarrassing situation. We hadn't anticipated this at the moment, and I don't believe we are prepared, are we?

THE COURT: Well, in the statement itself it states the defendant has not taken the stand. That is

in your statement. And the defendant, or any other witnesses you have now against the admission of this Exhibit T, this is the time here.

MR. STEARNS: What I had requested the Court to do was withhold admitting this until after the defendant had taken the stand.

After the testimony regarding the alleged admissions and confession by the Appellant which was held in the presence of the jury, to offer him an opportunity to rebut out of the presence of the jury is meaningless, not in accordance with due process of law or Oregon practice.

That the Oregon practice prior to June 22, 1964 required a court hearing out of the presence of the jury on the voluntariness of a confession prior to permitting testimony thereof in the presence of the jury is supported by many cases.

In *State v. Ely*, 390 P2d 348, 349-350, 237 Or 329 (Apr. 22, 1964), states the rule as follows: "A correct interpretation of our own cases, as well as those decided in the federal courts, would require the exclusion of an involuntary confession, whether made to law enforcement officers or to other persons. *State v. Green*, 128 Or 49, 61-62, 273 P 381 (1929). The fundamental question is whether the confession is the product of the free exercise of the confessor's will. *State v. Shipley*, 232 Or 354, 362, 375 P2d 237 (1962), cert. den. 374 US 811, 83 S Ct 1701, 10 L Ed2d 1034 (1963). See, for a more recent exposition of the rule on involun-

tary confessions, *Lynnum v. Illinois*, 372 US 528, 83 S Ct 917, 9 L Ed2d 922 (1963).

“(3) In this state, confessions and admissions are initially deemed to be involuntary. Before either can be received in evidence, the state has the burden of showing that it was voluntarily made, without the inducement of either fear or hope. ORS 136.540; *State v. Rollo*, 221 Or 428, 432, 351 P2d 422 (1960); *State v. Nunn*, 212 Or 546, 552, 321 P2d 356 (1958).

“The trial court, out of the presence of the jury, took the testimony bearing upon the Defendant’s confession. After it heard the relevant testimony and the arguments of counsel, the trial court ruled that the state had made a prima facie showing of voluntariness. The confession accordingly was received in evidence.”

In *State v. Linn*, 173 P2d 305, 309, 179 Or 499 (1946), the court restated the rule “the offer in evidence of a confession presents a preliminary question for decision of the trial court.” In *State v. Nagel*, 202 P2d 640, 653, 185 Or 486 the court announced the similar rule requiring a preliminary hearing upon admissibility of a confession outside of the presence of the jury.

In *State v. Nunn*, 321 P2d 356, 361, 212 Or 546 (1958), the procedure for offer of proof of a confession was again described as being out of the presence of the jury and in the court’s chambers.

In *State v. Bouse*, 264 P2d 800, 811, 199 Or 676 (1953), the court stated the rule "The admissability of a confession is in the first instance a mixed question of law and fact for determination by the trial judge. On the offer of accused confession, the court must first determine as a preliminary matter whether it was voluntary and not made under the influence of hope or fear. Although we have held that it is not necessarily reversible error for this preliminary investigation to be held in the presence of the jury (*State v. Spanos*, 66 Or 118, 134 P 6) yet, for obvious reasons, the better practice is that it be conducted in the absence of the jury. The Defendant has the right to be heard upon this preliminary investigation without waiving any of his other rights on the trial. He may offer evidence to rebut that of the state which tends to show that the confession was voluntary. If the court determines from its preliminary investigation as a matter of fact and of law that the confession was voluntarily made within the meaning of Section 26-937, OCLA, (ORS 136.540), Supra, then it, together with all testimony affecting its voluntary character, is admissible in evidence. * * *

In the case of *State v. Brewton*, 395 P2d 874, 880-881, 238 Or 590 (1964) court held as follows: "If the state elects a new trial and decides to offer a confession in evidence, it should so advise the court in camera. The court in the absence of the jury should then hear

all the evidence relevant to the voluntariness of the confession. The burden will rest on the state to prove to the satisfaction of the court that the confession was voluntary. If the court finds that the confession was voluntary, it shall note its finding in the record and admit the confession in evidence. Thereafter, as under our present practice, the state must again establish the voluntariness of the confession before the jury and the jury will be instructed that it has the duty to determine as a question of fact, first, whether the confession was voluntary, and second, if it was voluntary whether it was true, and that the issue of voluntariness shall be determined without regard to the truth or falsity of the confession. For an approved instruction conforming to the Massachusetts rule see *State v. Hood*, 69 Ariz 294, 213 P2d 368 at 371, 372 (1950).

“If the state elects to prove that the confessions received in the trial of this case were voluntary, the trial court shall hold a hearing and determine whether Brewton’s confessions were voluntary. If the court finds that the confessions were voluntary, it shall make an appropriate finding and enter a new judgment of conviction based on said finding and the verdict heretofore returned by the jury. Since in this case a life sentence is mandatory, there is no question concerning credit for time served on the sentence hereby vacated. Such credit shall be appropriate if defendant was serv-

ing a definite term of years. * * * "Although in this opinion we have referred only to the admissability of confessions, our holding is applicable with equal force to all alleged admissions of the defendant. See, ORS 136.540; McCormick, Evidence 236, Section 113."

CONCLUSION

Though in court many times, Appellant has consistently met with evasion upon the questions herein presented. To afford him proper relief it is necessary that his conviction be set aside so that these questions can be properly resolved in the trial court.

Respectfully submitted,

RAMIREZ & HOOTS

by GLENN D. RAMIREZ
of Attorneys for Appellant

I certify that in connection with the preparation of this brief that I have examined Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney for Appellant

APPENDIX A

Exhibits

(As there was no formal hearing on petition, exhibits were not marked.)

Transcript of testimony January 4, 1960.

Transcript of testimony June 28, 1965.

Appellant's Abstract of Record and Brief, Supreme Court of the State of Oregon.

Appellant's Reply Brief, Supreme Court of the State of Oregon.

APPENDIX B

138.530 *When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.* (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

O.R.S. 138.530(1a)—A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

O.R.S. 136.540(1)—A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against him when it was made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction without some other proof that the crime has been committed.

APPENDIX C

SOLOMON, Judge:

Leonard Marvin Lugo, in his Petition for a Writ of Habeas Corpus in this Court, contends that his 1960 conviction of first degree murder is invalid because the trial judge improperly admitted in evidence his confession. Lugo contends that he made the confession while intoxicated and in a state of traumatic shock. He also contends that the confession was made without his being informed of his right to remain silent and his right to an attorney.

The parties have stipulated that I may decide this case on the pleadings, the exhibits, the transcripts of Lugo's trial and post conviction hearing and the briefs in the Supreme Court of Oregon.

The transcripts show that Lugo shot and killed Joseph Martinez in an alley in Klamath Falls, Oregon, between 7:00 and 7:10 P.M. on August 31, 1959. Police Officer Mattmiller arrived within two minutes of the shooting. He found Lugo, Lugo's brother and George Hill. Hill later became the State's principal witness.

While he was being searched, Lugo told Mattmiller that he had shot Martinez, and told Mattmiller where he had thrown his gun.

About 20 minutes later, the officers took Lugo to the District Attorney's office and gave him coffee. Within an hour, Lugo completed a lengthy statement, which the stenographer then transcribed. Lugo cor-

rected the typewritten copy and signed it shortly after 9:00 P.M. It is admitted that Lugo was not informed of his right to remain silent and have an attorney until the statement was about to be dictated.

The parties do not agree on Lugo's condition at the time of his interrogation in the District Attorney's office. Lugo testified that he was intoxicated and in shock. On the other hand, several other witnesses testified that in their opinion Lugo was not intoxicated either at the time of the shooting or at the time of his interrogation. Deputy District Attorney Goakey testified that Lugo told him he had "had something to drink, but * * * wasn't drunk." Goakey also testified that "(Lugo) was definitely sober."

From a judgment of conviction and sentence, Lugo filed a notice of appeal to the Supreme Court of Oregon. However, after discussing the matter with his new attorneys and on their recommendation, he abandoned the appeal. Later, he filed a petition for post conviction relief under ORS 138.530. In his petition, he alleged that his written statement was inadmissible because he had not been timely informed of his right to remain silent and have a lawyer. *Escobedo v. Illinois*, 378 U. S. 478 (1964).

The trial court denied Lugo's petition, and Lugo appealed. The Oregon Supreme Court affirmed the denial. It held that since the final order in Lugo's case preceded the June 22, 1964, decision in *Escobedo*,

supra, Lugo's confession was not rendered inadmissible because the interrogators failed to warn him of his rights before questioning him. Since Lugo did not contend that his statement was coerced, the Court held it was properly admitted.

I agree. *Escobedo* cannot be applied to a trial completed in January, 1960. *Johnson v. New Jersey*, 384 U. S. 719 (1966).

There is no merit in Lugo's present contention that he was too intoxicated to make a voluntary statement. Lugo's testimony that he was drunk at the time of the shooting was contradicted by the opinions of four other witnesses who observed him. Lugo consumed a substantial number of drinks prior to the shooting, but the record is clear that he was not intoxicated enough to render his statements inadmissible.

Lugo in his memorandum of authorities filed with this Court on July 25, 1966, asserts that his constitutional rights were deprived him because the trial court failed to hold hearing outside the presence of the jury on the issue of the voluntariness of his confession. There is no merit in this contention. The trial judge gave Lugo's lawyers an opportunity to present testimony about the statement's voluntariness in a hearing outside the presence of the jury. When the defense attorneys declined that opportunity, the judge admitted the statement.

This opinion shall constitute findings of fact and conclusions of law in accordance with Rule 52(a) Federal Rules of Civil Procedure. Lugo's petition is dismissed.

Dated this 25 day of November, 1966.

GUS J. SOLOMON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES WILLIAM COLLINS,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
and H. L. SHADLE, Accountant,
San Quentin Prison,

Appellees.

No. 21605 ✓

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's complaint was conferred by Title 42, United States Code section 1981 et seq., and Title 28, United States Code section 1343. The jurisdiction of this Court is conferred by Title 28, United States Code section 1291.

STATEMENT OF THE CASE

On October 5, 1966, appellant filed a civil rights complaint under Title 42, United States Code

section 1983 et seq. with the United States District Court for the Northern District of California, No. 45756 in the files of said court (CT 1-6). On November 9, 1966, summons were served on defendants, Lawrence E. Wilson and H. L. Shadle (CT 13). On November 29, 1966, the District Court extended the time for filing of defendants' responsive pleading to December 13, 1966 (CT 14).

On December 9, 1966, defendants filed a motion to dismiss or in the alternative for summary judgment, and this motion was argued on December 28, 1966 (CT 15-25).

On January 3, 1967, the District Court ordered the action dismissed with prejudice because the complaint failed to state a claim against the defendants upon which relief could be granted (CT 35). Plaintiff's (appellant herein) motion for rehearing, filed January 13, 1967 (CT 36-37), was denied by the District Court on January 19, 1967 (CT 42). Also, on the latter date, the court granted plaintiff's motion to proceed in forma pauperis on appeal (CT 42).

SUMMARY OF APPELLEES' ARGUMENT

Accepting as true all of the allegations of fact in appellant's complaint, there is nevertheless no

reasonable construction under which the complaint states a claim against appellees upon which relief can be granted.

ARGUMENT

PRELIMINARY STATEMENT

Appellant's allegations are based on circumstances which are alleged to have occurred during the prosecution of his prior appeal before this Court in Case No. 20,633.^{1/} Thus, appellant contends that he submitted to the prison authorities for mailing on March 25, 1966, his opposition to the request of appellee in that case for an extension of time within which to file his brief; that the prison authorities, including appellees, failed to timely mail this opposition to the court; that the failure to timely mail the opposition was based on the knowingly false premise that appellant lacked sufficient funds in his account to pay the cost of postage; that as a result of this opposition having failed to reach the court for consideration along with

1. This appeal was decided by the Court of Appeals on November 18, 1966. Collins v. Wilson, No. 20633. The District Court's denial of appellant's petition for a writ of habeas corpus was affirmed. Appellant's continuing incarceration has therefore at all times been valid, and the alleged conduct of appellees herein, could not have resulted in actual damage to appellant.

the request for an extension of time, the extension was granted, the appellee was allowed to file his brief, and after the expiration of a considerable length of time the appeal was decided on its merits against appellant; and, therefore, as a result of Warden Wilson's failure to timely mail appellant's opposition to appellee's request for an extension of time appellant's incarceration was unduly extended. Appellant then concluded in his complaint that the conduct of Warden Wilson and H. L. Shadle resulted in damages in the amount of \$50,000.

THE FEDERAL DISTRICT COURT
DID NOT ERR BY DISMISSING
APPELLANT'S COMPLAINT.

The federally-protected right which appellant alleges was impaired by appellees' conduct is one of reasonable access to the state and federal courts. Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir. 1963) (emphasis supplied). That appellant had such reasonable access to the courts appears on the face of his complaint. Thus, it is apparent that appellant had actual access to the United States District Court for the Northern District of California wherein his petition for habeas corpus was filed and determined, and to the United States Court of Appeals for the Ninth Circuit wherein his appeal from the District Court's denial of the above petition was

filed and determined on the merits. With the exception of the particular document expressing appellant's opposition to appellee's request for an extension of time in the prior appeal appellant does not, and indeed truthfully could not, allege that each of the documents that he sought to send to those courts were not promptly mailed by the prison authorities. Moreover, appellant's opposition to any request on the part of appellee in the prior appeal for an extension of time within which to file his brief was expressed to the court by way of appellant's "Motion to Hold Respondent in Default" which was filed in Case No. 20633 on March 24, 1966 (CT 24), the day before Judge Chambers granted appellee's application for an extension of time (CT 23).

Speaking more in the general than in the specific, appellant's frequent access to both state and federal courts is a matter of record. Thus, appellant filed a petition for a writ of habeas corpus with the Superior Court for Marin County in Case No. 41558 in the files of said superior court on November 16, 1964; he filed a petition for habeas corpus in the United States District Court for the Northern District of California in Action No. 43231 in the files of that court on January 20, 1965; he filed a petition for habeas corpus in the California Supreme Court in Action No. 8760

in the files of that court on March 3, 1965; he filed a petition for a writ of habeas corpus with the United States District Court in Action No. 43803 in the files of that court on July 1, 1965 (It is the circumstances alleged to have occurred during the appeal from the denial of this petition that form the basis for the instant appeal); he also filed a petition for a writ of mandamus and a petition for certiorari with the United States Supreme Court, No. 210 Misc., October Term 1966, on May 18, 1966.^{2/}

There are therefore affirmative indications of record which show an absence of any prison regulation or practice pertaining to the preparation, service and filing of pleadings or documents, or to the sending and receiving of such communications, resulting in appellant's having been substantially delayed in obtaining a judicial determination in such a court proceeding.

For the above reasons, it was proper for the District Court to have determined that appellant's complaint did not state a cause of action against appellee

2. Appellant himself has made reference to most of the above actions in his opening brief, pages 1-2, filed in his prior appeal to this Court in Case No. 20633. This Court should take judicial notice of appellant's statements in this document, which is a part of its records on this prior appeal.

which could be based on their deprivation of appellant's right to reasonable access to the courts. See Hatfield v. Bailleaux, supra, at 637.

Any delay in this Court's final determination of appellant's prior appeal in Case No. 20633 was obviously not the result of the failure of appellees herein to promptly mail appellant's opposition to the request for an extension of time. This is especially evident when one takes into account the fact that appellant's opposition to that request for an extension of time was expressed to the Court of Appeals prior to the court's granting of the extension by way of his motion to hold appellee therein in default for failure to timely file his brief.

CONCLUSION

For the aforementioned reasons, appellees respectfully submit that the District Court properly dismissed with prejudice appellant's civil rights action on the ground that appellant's complaint failed to state a claim upon which relief could be granted.

The order should be affirmed.

DATED: April 14, 1967

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General

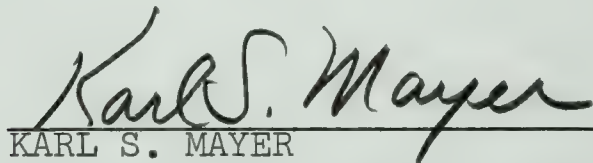
Karl S. Mayer
KARL S. MAYER
Deputy Attorney General

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

April 14, 1967



KARL S. MAYER

Deputy Attorney General of
the State of California

N O. 2 1 6 1 5 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF
DEFENSE, WALTER T. SKALLERUP, JR.,
DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

v.

JOSEPH J. REMENYI,

Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' OPENING BRIEF

J. Walter Yeagley,
Assistant Attorney General,

Wm. Matthew Byrne, Jr.,
United States Attorney,
Central District of California,

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FILED

SEP 15 1967

WM. B. LUCK, CLERK

Attorneys for Appellants

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APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Central District of California ordering that appellee be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force (R. 254-255). Jurisdiction below was founded upon 5 U. S. C. 1009 and 28 U. S. C. 2201-2202 (R. 2). Jurisdiction of this appeal is conferred by 28 U. S. C. 1291.

The complaint, filed by appellee below, was filed

subsequent to a final determination by the Department of Defense that the granting of authorization to appellee for access to classified information was not clearly consistent with the national interest (R. 68, 4). The complaint attacks this denial of access to classified information on the grounds, inter alia, that the procedures followed were unauthorized by statute or regulation, that the procedures were violative of due process of law, and that the appellants had abused their discretion (R. 5-6).

After a hearing, the Court below, by Chief Judge Clarke, issued findings of fact and conclusions of law holding that the procedures followed were conducted in an arbitrary manner and did not conform to the requirements of due process, and that the determination that access authorization to appellee for classified information was not in the national interest, was arbitrary and an abuse of discretion. The Court also made the finding that "the granting of access authorization to [appellee] for information classified at the Secret level is clearly consistent with the national interests" (R. 184-189).

On the basis of these findings, the Court, on August 15, 1966, issued its judgment which ordered, inter alia, that "[appellee] be granted access authorization to information classified as Secret" and which remanded the matter to the proper administrative board of the Department of Defense "for further proceedings in conformity with this judgment" (R. 254-255).

Appellants filed a motion to alter or amend the Judgment and Findings of Fact and Conclusions of Law seeking to strike that

part of the Court's orders which directed that appellee be granted access to classified information, while retaining the order remanding the matter to the administrative board for further proceeding in accordance with the Court's findings. This motion was denied (R. 257) and this appeal followed. 1/

STATEMENT OF THE CASE

This case arises under the Industrial Personnel Security Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960. 2/ Appellee, the plaintiff below, was employed by the Rocketdyne Division of North American Aviation, Inc. at Canoga Park, California and, as a result of such employment, he was required to have clearance for access to information classified as "secret" in accordance with Executive Order 10501, 18 Fed. Reg.

1/ The operation of the judgment has been stayed pending final disposition by this Court (R. 279-280).

2/ The pertinent portions of E. O. 10865 and Directive 5220.6 are set forth as Appendix I, infra.

Directive 5220.6 was superseded on January 7, 1967 by a new directive carrying the same number dated December 7, 1966. The provisions of the earlier regulation were in effect during the periods with which we are here concerned. Moreover, the changes so far as the procedures giving rise to the present case are concerned, are changes of form and terminology rather than of substance. Therefore, unless otherwise noted, reference is to the provisions of the Directive dated July 28, 1960 and set forth in the Appendix.

7049. ^{3/} Appellee applied for a "Secret" clearance on or about February 1959. On November 12, 1963, the Department of Defense notified appellee and his employee that any authorization appellee possessed for access to classified information was suspended. The notice stated that the screening Board had concluded that the information available to it did not warrant granting appellee a "Secret" clearance and, that, pending final disposition of his case, access was not authorized at any level (R. 11-13). As a result of such suspension, appellee's employee terminated his employment (R. 185-186; 363).

The suspension was directed by the Industrial Personnel Access Authorization Screening Board of the Department of Defense in accordance with the provisions of Directive 5220.6 and, as required by that Directive, the Screening Board issued at the time of the notice a "Statement of Reasons" informing appellee of the grounds upon which his security clearance would be denied or

^{3/} E. O. 10501, pertinent portions of which are set forth in App. I, infra, is the basic document exercising the President's authority to protect national defense information against unauthorized disclosure. It provides for three categories of national defense information which are, in descending order, "Top Secret"; "Secret" and "Confidential". "Secret" is defined as "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations".

revoked (R. 14-16; 312-315). ^{4/} Appellee filed an answer to the Statement of Reasons and requested, as provided for by the applicable procedures, a personal appearance hearing before an Industrial Personnel Access Authorization Field Board. The case was referred to the Los Angeles Field Board for a hearing (R. 312).

The procedures for such hearings are prescribed by the Directive in Section IV, E., and such procedures include the direction that an applicant be afforded the opportunity to cross-examine witnesses, see Section IV, E, 2, (b). However, the directive also provides for a certification procedure permitting the introduction of witnesses testimony without confrontation and cross-examination under limited and specified circumstances when such circumstances are found to exist by the Secretary of Defense, see Section V, E, 2(f). This procedure is authorized by E. O. 10865, Section 4.

The Defense Department's chief witness, unidentified in

^{4/} The Statement of Reasons included, inter alia, that appellee had had contact, during 1948 and 1949, with the Chief of the Czechoslovakian Intelligence Service in Vienna, Austria, that appellee, in 1945, forged documents which falsely stated that he had been a political prisoner of the Nazis and used such false documents in an application for Austrian citizenship, and that appellee, in interviews with the Air Force in 1960, had, under oath, testified falsely concerning these activities. These "Reasons" were found to be true by the Field Examiner, who conducted appellee's hearing as described above, upon consideration (R. 312-315) and reconsideration (R. 300-301), and by the administrative appellate body within the Department of Defense, the Central Industrial Personnel Access Authorization Board (R. 303-304, 308-309). Both the Field Examiner and the Central Board found appellee, in view of his character, an individual who would act contrary to the national interest (R. 315, 301, 310).

the Record, is a person, now a citizen of the United States, who refused to testify in the presence of the appellee or under conditions where his true identity would be disclosed to appellee. The witness based his refusal on the fear that he would otherwise jeopardize the safety of certain close relatives still residing in Czechoslovakia (R. 68-69; 304-305; 292). The witness would agree to testify and submit to cross-examination by appellee's attorneys so long as his true identity was concealed from appellee. Appellee and appellee's counsel agreed to this procedure. ^{5/} Arrangements were therefore made to take the witnesses' testimony in the presence of the Field Examiner, but, during the taking of such testimony, it became apparent that the elicited testimony would lead to identification of the witness by appellee and the examination was continued outside the presence of the Examiner. The testimony of the witness was then set forth in summary or conclusory form in a stipulation signed by both counsel for appellee and counsel for the Department of Defense and the stipulation was entered into evidence at the hearing (R. 291; 305-306; and see Stipulation and the letter of appellee's counsel dated February 6, 1964 set out in

^{5/} As noted below, appellee's counsel subsequently claimed that this agreement had been coerced by counsel for Department of Defense who informed the appellee's counsel that if an agreement could not be reached to obtain this testimony, a resort could be made to the certification procedures of E.O. 10865 and Directive 5220.6 permitting the Secretary of Defense to certify to the statement of a witness whose identity can not be disclosed for "good and sufficient" cause, thus eliminating any confrontation whatsoever (See Section 4 of E.O. 10865, and paragraph IV, E, 2(f) of Directive 5220.6. Appendix I, infra and (R. 68-70; 306, 300).

The Field Examiner subsequently issued his report which set forth his findings concerning the information alleged in the Statement of Reasons and which concluded that "it would not be clearly consistent with the national interest to grant [appellee] access authorization to classified information at any level" (R. 312-324). Pursuant to the applicable provisions of Directive 522.6 this Report was forwarded to the Central Industrial Personnel Access Authorization Board for final determination. The Central Board tentatively decided to make the same finding as the Field Examiner and, as required by the Directive, appellee was offered an opportunity of an appearance before the Board, which was requested and at which appellee appeared through his counsel. At the outset of the Central Board proceeding, counsel for the Department of Defense and for appellee advised they had agreed, subject to the Board's approval, to reopen the record to permit further examination of the unidentified witness. 7/ The Board's approval was given (R. 304-305).

Subsequently, additional evidence, including a fifty page

6/ The Stipulation and letter were, of course, part of the record in the court below.

7/ Appellee claimed, and the Court below found, that the Department of Defense counsel contacted the members of the Central Board outside the presence of appellee's counsel and without counsel's consent (R. 5, 187). The answer of the appellant's below was that the only such contact occurred when Department Counsel approached the Central Board to advise them of the agreement between counsel concerning reopening the record and that this contact was with the knowledge and consent of the appellee's counsel (R. 75).

deposition of the unidentified witnesses testimony on cross-examination, was submitted to the Field Examiner, for consideration and the Field Examiner forwarded a "Supplemental Field Board Report" (R. 290-301) to the Central Board, once again concluding that it was not "clearly consistent with the national interest to grant [appellee] access authorization to classified information at any level" (R. 399-301). After consideration by the Board, including the filing of a brief by appellee in lieu of an offered opportunity for a further personal appearance before the Board (R. 303, 305-307). The Central Board issued its final determination ^{8/} "that the granting of authorization to [appellee] for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest" (R. 310), and this suit followed.

After hearing, the court below issued findings of fact in which it found (R. 186-187) that the hearing proceedings and the Central Board determination were "arbitrary and failed to conform to the requirements of due process because of the following facts:

- a. [Appellee] was not permitted to confront the witness testifying against him nor to know the witness' identity;
- b. The transcript of the personal appearance proceedings held February 12, 1964, was

^{8/} Directive 5220.6, paragraph I (3), provides that, with specified exceptions not here applicable, the Central Boards' determination shall be final.

destroyed without authority and there no longer is any record of that portion of the proceedings;

c. Counsel representing [appellants] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [appellee] or [appellee's] counsel and without consent on the part of [appellee] or [appellee's] counsel;

d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board;" 9/

The "findings of fact" also included the district court's finding that the unidentified witness' "testimony should be expunged

9/ Appellants, of course, relied, in the court below, on the agreement and stipulations entered into by appellee's counsel concerning the examination of the unidentified witness. As noted above, note 6, supra, appellee's counsel contended that their agreement had been coerced. The destroyed transcript refers to the notes taken at the beginning of the unidentified witnesses examination in the presence of the Field Examiner. As already described, that examination was terminated and the testimony merged into a stipulation. It was the position of the appellants that, on this basis, such destruction was not improper.

As to the improper contact, see note 7, supra. The evidence not properly authenticated apparently refers to letters concerning records of the Austrian Federal Police. Appellant's position below was that use of such evidence is permitted by the applicable regulations and that, since the Examiner stated his decision would not be changed by the exclusion of such evidence (R. 299) their admission, even if in error would not be reversible error.

from the record at the personal appearance proceedings" and that on such record "the granting of access authorization to [appellee] for information classified at the 'secret' level is clearly consistent with the national interests" (R. 188).

The district court then issued its judgment which ordered that the testimony of the unidentified witness and the stipulations referring thereto, be expunged from the administrative record (R. 254-255). The judgment also ordered (R. 255):

"That [appellee] be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force;"

As described in the Jurisdictional Statement, appellants' filed a motion to amend this latter portion of the court's judgment and, upon denial of the motion, this appeal followed.

QUESTION PRESENTED

Whether the District Court had authority and jurisdiction to order that appellee be granted access to information classified as secret by the United States Army, Navy and Air Force.

ARGUMENT

I

THE DISTRICT COURT LACKED AUTHORITY AND JURISDICTION TO ORDER THAT APPEL- LEE BE GRANTED ACCESS TO CLASSIFIED INFORMATION.

A. Introduction

In Greene v. McElroy, 360 U.S. 474, the Supreme Court decided that the particular procedures followed in denying the petitioner access to classified information had not been authorized and decided the case on the narrow ground of lack of authorization, 360 U.S. at 493, 508. In reaching its decision, the Court declined to consider the difficult and far-reaching Constitutional questions concerning whether or not procedural due process requirements are applicable to administrative hearings culminating in the denial of a security clearance and, if so, whether confrontation would be constitutionally required in such proceedings. ^{10/} And the Court's holding did not require it to consider the extent of the permissible

^{10/} There have been lower court decisions answering both these questions in the negative, holding that the government's power to exclude individuals from classified information is exclusive and absolute and that procedural due process was not applicable, Von Knorr v. Miles, 60 F. Supp. 962, vacated on jurisdictional grounds, but affirmed on this point, 156 F.2d 287 (C.A. 1); or that confrontation was not constitutionally required, see the Court of Appeals' decision in Greene, *supra*, Greene v. McElroy, 254 F.2d 944, which was, of course, not passed on by the Supreme Court. Cf. Unglesby v. Zimny, 250 F. Supp. 714 and Bailey v. Richardson, 182 F.2d 46 (C.A.D.C.) affirmed by an equally divided court, 341 U.S. 918.

judicial review concerning the application of such procedures.

While the present case potentially involves these issues, the view we take of the case, and the posture in which it comes before this Court avoids the necessity of considering such issues. As noted in the Statement, the applicable regulations, contained in Department of Defense Directive 5220.6, provide for confrontation with an exception being allowed only in those cases in which the Secretary of Defense certifies that the witness cannot appear to testify because disclosure of his identity would be substantially harmful to the national defense or due to other good and sufficient cause (see Statement, *supra*, p. 5, and Directive, paragraph II, E, 2(f) and E.O. 10865, Section 4 in Appendix I, infra). The certification procedure was not used in the present proceedings and the validity of that procedure and the questions which would be raised by its use are not now before the court. Thus, the only applicable procedures with which the court could be concerned are those providing for confrontation.

That the necessary authority for such procedures exist has already been decided by the Supreme Court, Greene v. McElroy, *supra*, 360 U.S. at 506; Cf. Ogden v. United States, 303 F.2d 724 (C.A. 9), cert. denied 376 U.S. 973. But, it is equally clear that the extent of confrontation granted by the regulations was not provided the appellee in the present case. If appellee was not provided the full procedures required by the regulations and had not waived those procedures the administrative action was invalid, Vitarelli v. Seaton, 359 U.S. 535.

Our position below, of course, was that the granted right of confrontation had been waived. Such a waiver, if voluntary, would be valid, Williams v. Zuckert, 371 U.S. 531 and 372 U.S. 765. As we read the district court's decision, particularly in view of the allegations of the complaint (R. 4) that the waiver was compelled, it is that the waiver was involuntary and thus invalid, and that, therefore, the procedures actually followed were invalid. ^{11/} Since such a finding rests on a factual determination by the court below, we have not appealed from such findings.

In brief, then, as we read the district court's findings, the district court held only that the administrative action in this case was invalid and the holding was based on the facts of this case, the district court did not invalidate the procedures provided for by the applicable regulations, nor pass upon the issue of whether non-confrontation, if achieved pursuant to the certification procedure provided for by the regulations, would be constitutionally valid. The case as it is before the Court thus avoids the issues which the Supreme Court failed to decide in Greene v. McElroy, supra.

However, the order issued by the district court on the basis of its findings reaches a result which the Supreme Court not only did not reach in Greene v. McElroy, supra, but one which

^{11/} As noted in the Statement, supra, the District Court also made findings involving other aspects of the proceedings below-concerning the destruction of the reporter's notes, alleged improper contacts with the Central Board, and the receipt of evidence-but these too relate to the proceedings in this case, rather than the proceedings prescribed by the applicable Executive Orders and regulations.

Mr. Justice Harlan felt it necessary to preclude when, in his special concurring opinion, he stated "and certainly there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material". 360 U.S. at 510. The district court's order here imposes just such a requirement for, as noted in the Statement, it ordered (R. 255):

"2. That [appellee] be granted access authorization to information classified as Secret. . . ."

This drastic judicial order - totally unprecedented - will result in the forced disclosure of classified information by the Executive. We submit that the district court lacked the authority and jurisdiction to so order.

B. Control Over Military Secrets is an Executive Function Which Has Never Been, and Should Not Be, Subjected to Judicial Control.

The authority and responsibility for the protection of official information affecting the national security is granted and delegated by Executive Order 10501, 18 Fed. Reg. 7049 (Appendix I, infra). As this Court stated in Ogden v. United States, supra, 303 F.2d 724 at 729 describing E. O. 10501 (emphasis added):

. . . This Presidential Order established a comprehensive program for the classification, marking, custody, dissemination, and transmission of official information relating to the national defense.

The Order directed departments and agencies having direct responsibility for the national defense to classify such material and control its subsequent dissemination in accordance with the standards and procedures stated in the order. The Order made it clear that classified material was to be made available only to "authorized persons, in or out of federal service," [§ 5(i)] and that it was the duty of the Department involved to see that "unauthorized persons are prevented from gaining access thereto," [§ 6] as the Order stated, "by sight or sound." [§ 6(e)] More specifically, the Order directed that "knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy," [§ 7] and that "classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department * * * [§ 7(b)]

The second Presidential Order here relevant, Executive Order 10865, 25 Fed. Reg. 1583, restates the authority and responsibility of the Executive Department heads to protect classified information and directs them to issue regulations protecting

the release of classified information within industry, E.O. 10865, § 1(a). As we have just noted, E.O. 10501 directs that classified information be disseminated only to those individuals "determined to be trustworthy" (§ 7). E.O. 10865 directs that authorization for access to classified information "may be granted by the head of a department or his designee" to an individual "only upon a finding that it is clearly consistent with the national interest to do so" (§ 2). E.O. 10865 also provides that "[n]othing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access . . . if the security of the nation so requires." (§ 9)

In short, the power and responsibility to protect classified information flows from the power and responsibility of the President and has been granted and delegated to the heads of the executive departments. The power of the executive department to control, in the internal operations of the executive branch, the dissemination of classified defense information in its custody is peculiarly an executive function. For reasons implicit in the constitutional separation of powers, the courts have traditionally refused to intervene in the conduct by the Government of its internal affairs. These are matters which have wisely been left to the discretion of the executive and to correction, if necessary, by political processes. As the Supreme Court long ago recognized, and has frequently repeated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief,

and we are quite satisfied that such a power was never intended to be given to them". Decatur v. Paulding, 14 Pet. 497, 516.

The judgment of the court below - ordering the executive to grant an individual access to classified information - attempts to subject the plenary power of the executive to control the dissemination of military secrets in the course of executive operations to judicial control. Such control would, we submit, seriously impinge upon the necessary powers, and responsibility, of the executive to protect information vital to the national security and take onto the courts an authority and a responsibility they have never assumed. Such control would, we further submit, do violence to the fundamental doctrine of the separation of powers.

The district court's attempt at judicial control of this executive power is not only totally unprecedented, it is control that has been consistently disowned by the courts themselves. In reaching its holding in Greene v. McElroy, supra, the Supreme Court left undisturbed the fundamental conclusion of the Court of Appeals for the District of Columbia Circuit, which held that the decision as to who is entitled to access to classified information must be made, not by the judiciary, but by the executive. The Court stated (254 F.2d 944 at 954; emphasis added):

In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an unwarranted

interference with the responsibility which the executive alone should bear, were the judiciary to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.

In reaching this conclusion, the Court of Appeals was merely reaffirming its statement in the earlier case of Vitarelli v. Seaton, 253 F.2d 338, reversed on other grounds, 359 U.S. 535 that "[i]t is not our function to decide whether appellant was or was not untrustworthy, or a 'security risk'." (253 F.2d at 343). Cf., Von Knorr v. Miles, supra, 60 F.Supp. at 971. And, we have already referred to Mr. Justice Harlan's concurring opinion in Greene v. McElroy, supra, in which he sought to make clear that there was "nothing in the Court's opinion which suggests that petitioner must be given access to classified material" (360 U.S. at 510).

The executive power perhaps most closely analogous to that involved here is the power of removal of government employees. The interest of the government in denying access to military secrets to individuals whom executive department heads find untrustworthy is directly comparable to the government's interest in employing only individuals in whom it has trust and confidence. In cases challenging the validity of administrative dismissals of government employees, the courts have refused to go beyond a determination

that any procedural or substantive rights granted by Executive Order or by statute have been complied with, ^{12/} the courts have refused to exercise judgment over who should be hired or retained. That history was canvassed in detail in the opinion of the court of appeals in Bailey v. Richardson, 182 F.2d 46 (C.A.D.C.), affirmed by an equally divided Court, 341 U.S. 918, upholding the constitutionality of the dismissal of government employees on loyalty grounds without confrontation of witnesses, and need not be repeated here. The Court of Appeals stated (182 F.2d at 62):

"The judiciary cannot assume the responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power.

* * * *

It is inescapable from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination...."

And Cf., Beard v. Stahr, 200 F. Supp. 706, 773 (D.C.D.C.), vacated on other grounds, 370 U.S. 41. And see this Court's recent opinion in Mancilla v. United States, et al., ___ F.2d ___ (C.A. 9, 1967)

^{12/} Subject, of course, to the requirement that the statutory grounds for dismissal may not be patently arbitrary or discriminatory. There was no finding here, nor could there be, that the standards for denial of access imposed by E.O. 10501 and E.O. 10865 and implemented in Directive 5220.6 were arbitrary or discriminatory.

What is true of the executive's power over its employees is true with redoubled force of the power to say which private persons may have access to secret military information, for here we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the executive branch any greater or any clearer; if any powers of the executive are to remain free of judicial control, they must surely include the power to exercise ultimate control of classified defense information.

Moreover, the order of the court below, if allowed to stand, would not only constitute undue interference with the executive's responsibility for the protection of information relating to the national security and violate the separation of powers doctrine, the judicial control it attempts would inevitably involve the courts in passing judgment on the executive's appraisal of the requirements of the national security, a function which the courts are ill-equipped to perform. The resolution of the question of whether an individual's access to classified information is "clearly consistent with the national interest", the standard imposed by E.O. 10865, requires, we submit, knowledge and background of a kind not

13/ Another line of cases applicable by analogy are those in which classified information is sought in civil actions between private parties. The courts have refused to direct the disclosure of classified information despite the resulting effect on the rights of private parties, see Reynolds v. United States, 345 U.S. 1; Pollen v. Ford Instrument Co., 26 F. Supp. 583 (D.C.E.D.NY); Firth Sterling Steel v. Bethlehem Steel, 199 F. Supp. 353 (D.C.E. D.Pa); Cf. Totten v. United States, 92 U.S. (Otto) 105.

normally possessed by the courts and involves an ultimate judgment of a kind which peculiarly must be made by those who bear the responsibility for the wisdom of their judgments. 14/

In Greene v. McElroy, supra, the Court of Appeals pointed out that for the Court to seek to determine the individual's qualification for access would involve (254 F.2d at 953):

" . . . judgment remote from the experience and competence of the judiciary. Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the government. "

And, as already quoted, the Court observed (254 F.2d at 954):

In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an

14/ The district court found that "the granting of access authorization to [appellee] for information classified at the Secret level is clearly consistent with the national interest" (R. 188). As we have pointed out, the power and responsibility to make such a determination is an executive function and has been entrusted by the President to the executive department heads. We have argued that such determinations have not been made and should not be made by the courts. If this court, as we submit it should, vacates the district court order and orders a remand of the matter to the proper administrative unit of the Department of Defense, the order should, and by implication must, vacate this finding, whose invalidity rests on the same issue and considerations invalidating the district court's order.

unwarranted interference with the responsibility which the executive alone should bear, were the judiciary to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.

All the foregoing considerations, we submit, conclusively demonstrate that the order of the district court must be vacated. We would note that such a concept is not new or novel, but is deeply rooted in our doctrine of the separation of powers and in our constitutional history. We have already referred to the famous remarks made by Mr. Chief Justice Taney over a century ago in Decatur v. Paulding, supra, 14 Pet. at 516, concerning the inadvisability of and the lack of authority for judicial interference with the performance of the duties of the executive department. In Marbury v. Madison, 1 Cranch 137, Chief Justice Marshall stated (1 Cranch at 164):

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

* * * 15/

One final consideration must be raised. The district court's order not only exceeded its jurisdiction, it was not fully in accord with its own findings. As described in the Statement, supra, appellee's access authorization for secret material was denied and

15/ The rule of law as stated by Chief Justice Marshall, points up the clash of authority which would result if the district court's order were allowed to stand and underscores, we believe, our position that that order violates the separation of powers doctrine. The President had directed the appellants', the Secretary of Defense and his appropriate designee, to permit access only when, in their discretion, such access is clearly consistent with the national interest, but the district court has ordered access not merely in the absence of such a determination but in the face of appellants directly contrary determination. While the court's have jurisdiction to direct the performance of ministerial duties by the executive, Marbury v. Madison, supra, they do not have jurisdiction over executive department heads to compel acts which are in no sense ministerial, State of Mississippi v. Johnson, 71 U.S. 475, 489-90, 498-500.

And we would note that the President, in E.O. 10865 has directed (§ 9) "Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires." And see Greene v. McElroy, supra, 254 F.2d at 953; Von Knorr v. Miles, supra, 60 F. Supp. at 971.

his existing access authorization 16/ was suspended, pursuant to the applicable regulations, by the Screening Board (R. 12). Thereafter, appellee availed himself of the further proceedings - a Field Board hearing and appeal to the Central Board - provided for by the regulations. It was these subsequent proceedings which the court's findings invalidated; there was no finding that the Screening Board's action was in any way unauthorized or invalid. The continued and unchallenged validity of the Screening Board's action constitutes a viable and valid determination that appellee does not meet the standard for access to classified information at any level, let alone the Secret level, and the Court's order is in direct conflict with its findings. 17/

This case, while raising very serious issues, remains simple in concept. Appellants conducted the proceedings below both on the assumption that the agreement entered into with appellee

16/ Though not completely clear from the Record, this was apparently at the level of Confidential prior to the Screening Board's action (R. 303).

17/ If we are correct in our arguments that the courts should not undertake to determine whether appellee is sufficiently trustworthy to be entitled to a security clearance and should not seek to control executive discretion by instructing the executive officials who are appellants here or an executive administrative agency to make such a favorable determination, the maximum relief the court should have granted appellee was a remand for further administrative action. In view of the continued validity of the Screening Board's suspension order and since the matter was heard before the Field and Central Boards on the assumption that the agreement entered into by appellants and appellee, now struck down by the court, was valid, we submit it is to the Screening Board that the case should be remanded. The appellee or the appellants may then choose to follow the procedures of the regulations in response to the Screening Boards outstanding suspension order.

and his counsel was valid and on the belief that the agreed upon procedure in fact provided greater protection than would have been provided by resort to other procedures permitted by the regulations (R. 306, 68-70). Admittedly, the agreed upon procedure actually employed did not comply with the applicable regulations. Accepting, as we must since we have not appealed this point, the district court's finding that the agreement was invalid, we readily agree that the procedures followed were then unauthorized and must fall. The proper relief to be granted in such a case is, we submit, to remand the matter to permit further proceedings in accordance with the regulations.

In contrast, the relief granted by the court below is, in substance, a mandatory injunction requiring that the government grant appellee access to defense secrets, ^{18/} notwithstanding the judgment of the Screening Board that such disclosure was not clearly consistent with the national interest. The court below has

^{18/} In an attempt to counteract any lessening of emphasis which may stem from the necessary repetition of the terms classified information and secret information throughout this brief, we again quote E.O. 10501 to describe the type of information to which the district court has ordered access. E.O. 10501, Section 1(b) defines Secret information as:

. . . defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

in effect sought to compel appellants, executive officers of the Government, to act in opposition to what they believed to be required by vital national interests.

As we have attempted to establish, the fundamental issue in this case is the separation of powers. For over a century and a half the executive has borne the complete responsibility for the preservation of military secrets, accountable to the electorate for both the inadequacy or the excessiveness of security measures. It is particularly appropriate, within the framework of our system of separate powers that the courts refrain from entering such a field, one from which they have abstained for 170 years and which poses issues far different from those traditionally dealt with by the courts.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment below should be vacated insofar as it directs the Secretary of Defense to grant a Secret access authorization to appellee without further administrative proceedings. The matter should be remanded for further administrative proceedings.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ M. Morton Freilich
M. MORTON FREILICH

APPENDIX I

EXECUTIVE ORDER

10501

SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Section 1. Classification Categories: Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

* * *

(b) Secret: Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments

important to national defense, or information revealing important intelligence operations.

* * *

Section 6. Custody and Safekeeping:

* * *

(e) Custodian's Responsibilities: Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

* * *

Section 7. Accountability and Dissemination: Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

* * *

(b) Dissemination Outside the Executive Branch: Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

* * *

EXECUTIVE ORDER

10865

SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interests:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection

(a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

* * *

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless he applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his

designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

* * *

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

* * *

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Industrial Personnel Access Authorization Review
Regulation

Reference: (a) DOD Directive 5220.6, entitled "Industrial
Personnel Security Review Regulation", dated
February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority
vested by law, including Executive Order 10865 (re-
produced as Appendix A), in the Secretary of Defense.

* * *

B. Purpose

1. The Secretary of Defense and the Administrators
of the Federal Aviation Agency, and the National
Aeronautics and Space Administration have pre-
scribed specific requirements, restrictions, and
other safeguards which they consider necessary
to protect (a) releases of classified information
to or within United States industry that relate to
bids, negotiations, awards, or the performance
or termination of contracts with their department
or agency, and (b) other releases of classified
information to or within industry which their
department or agency has responsibility for safe-
guarding. In this connection, this Regulation pre-
scribes uniform standards, criteria, and proce-
dures for processing to final determination all
cases which come within the scope of the Industrial
Personnel Access Authorization Review Program.

* * *

3. This Regulation is issued to conform the Industrial
Personnel Access Authorization Review Program
to the requirements of Executive Order 10865.

C. Definitions

* * *

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

* * *

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I. F. and V. B.

* * *

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject

to the provisions of the Administrative Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.
2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

* * *

II. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or

continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.
2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.
3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.
4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.
5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.
7. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.
8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.
9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.
10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Paragraphs 11. through 19. and part of paragraph 20 have been omitted.)

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relative which may be likely to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III. B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access

authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.
3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.
4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer, director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III. A. and III. B., above.

IV. PROCESSING OF CASES

* * *

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

* * *

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

* * *

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for

Confidential should be suspended or limited.

6. The Director shall forward the Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV. C. 7 shall be afforded:

- a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.
- b. A reasonable time to prepare for that appearance.
- c. An opportunity to be represented by counsel without cost to the Government.
- d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV. E. 2.

* * *

D. Personal Appearance

* * *

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense

for the purpose of these proceedings.

* * *

E. Procedures for Personal Appearance Proceedings

1. General Provisions

* * *

2. Introduction of Information

- a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissable in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.
- b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received

and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

* * *

- f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

- (1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.
- (2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a), (2), of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has

determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * *

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. The report shall not be made available to the applicant.
2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information

with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access
Authorization Board

* * *

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:
 - a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and through the Director, shall give notice thereof to both the applicant and department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

* * *

Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.
2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.
3. Determinations of the Central Board shall be final subject only to:
 - a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;
 - b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.
 - c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

* * *

K. Authority of the Secretary of Defense, and the Admini-
strators, Federal Aviation Agency & National Aeronau-
tics and Space Administration

Nothing contained in this Regulation shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

* * *

APPENDIX II

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LAW OFFICES OF
WRIGHT, WRIGHT, GOLDWATER AND MACK
Suite 502 Rowan Building
458 South Spring Street
Los Angeles, California 90013
Telephone 626-1291

February 6, 1964

Director
Office of Industrial Personnel
Access Authorization Review
Pentagon
Washington, D. C.

Attention: Mr. John Davis or Mr. Roland Morrow

Re: NAME: REMENYI, Joseph Julius
DOB: February 16, 1904
POB: Zips-Neudorf, Czechoslovakia
CASE NO: OSD 60-72

Gentlemen:

We have not received any official notification of the hearing date. We discussed this matter with Mr. Curtis February 6, 1964, and he advised that the hearing will start February 13, 1964, at 1409 Wilshire Boulevard, Santa Monica, California. I further understand that the testimony of the government witness will be taken at 1:30 p. m. Wednesday, February 12th at the same address.

We have agreed that we will not object to the manner in which the evidence from the particular government witness is presented. We understand that this particular witness wants his identity to remain secret. He has agreed that Mr. Loyd Wright may participate in his examination and cross-examination on behalf of our client, Joseph Remenyi. Mr. Wright is to give his undertaking that he will not divulge the identity of the witness. We have requested that the undersigned be permitted to participate in the examination and cross-examination upon giving the same undertaking. You have advised the witness had not agreed but that you would request once again that I be permitted to participate in his examination and cross-examination. You will not object in the event Mr. Wright requests that the testimony of the witness be interrupted prior to cross-examination so that he may have an opportunity to confer with our client for a reasonable period of time. Please advise of the form of the undertaking you request from Mr. Wright or from

me in the event I am allowed to participate.

It is our understanding that you will furnish us with copies of any written statements made concerning our client by any government witnesses. We would particularly like to receive a copy of any statement made by the witness whose testimony is to be taken February 12th as soon as possible.

It is our present intention to present the testimony of six witnesses. Since we do not know what your evidence will include, we cannot be more definite.

The Statement of Reasons issued in this matter at Paragraph 2(c) lists certain items of documentary evidence. We would like an opportunity to inspect those documents or copies as soon as possible. We also request the inspection of any other documentary evidence you intend to produce at the hearing.

Very truly yours,

(signed) Andrew J. Davis, Jr.,
Andrew J. Davis, Jr., for
WRIGHT, WRIGHT, GOLDWATER
and MACK

AJD:sa

cc: Dr. Joseph Remenyi

In the Matter of)
)
Joseph Julius Remenyi,)
)
Applicant)
)

OSD 60-72

STIPULATION

It is hereby stipulated by and between the Applicant, Joseph J. Remenyi, Andrew J. Davis, Jr., Esq., counsel for the applicant, and John Davis, Esq., counsel for the Department of Defense, that:

The Department of Defense has made available for detailed examination by applicant's counsel, a witness, who, for the period from 1946 to April 1949, was an official of the Czech Embassy in Vienna. To facilitate the examination of this witness, the Department of Defense has made available to counsel for the applicant contemporaneous reports made by this witness to the U. S. Government and other statements made by him to investigative agencies since his arrival in the United States in 1949. The Department of Defense has also made available certain other information which bears upon the reliability of this witness' testimony.

From about February 1948, when the Communist Party in Czechoslovakia took control of the Government, until April 1949, the witness was engaged in intelligence work for the U. S. Government. In the course of this work, he was in a position to obtain certain information which, in order to protect his identity and the interests of the U. S. Government, is set forth as conclusions and not in detail in the summary of his testimony contained in this stipulation.

U. S. Government records reflect that this witness' information was characterized as "fairly reliable" at one time, and at a

later date of "extraordinary value and sensitivity" and as "he was considered a reliable informant".

SUMMARY

If the above witness were called he would testify as follows:

1. During all the relevant period until April 1949, the witness was employed as an official of the Czech Embassy in Vienna.

2. He met the applicant in his official capacity when the applicant applied for travel documents in 1946 at which time he was referred by the witness to Wilhelm Karas, the Security Officer of the Embassy. The witness had further official dealings with the applicant in 1947, when the applicant applied for a Czech passport and the witness again referred him to Wilhelm Karas. During the entire relevant period, Wilhelm Karas in addition to his ostensible official duties as Legation Secretary was also Chief of the Czech Intelligence Service for Austria. In gathering information he made trips to the French and American Zones of Austria, contacting sources of information and utilizing the witness' official duties as a cover for his intelligence activities. Subsequent to February 1948, when the Communist Party of Czechoslovakia took control of Czechoslovakia, Karas continued to function in the dual capacity described above.

3. In February 1948 the witness determined to defect to the West, and approached an official of the U. S. Government for this purpose. He was asked by this official to continue as an official of

the Czech Embassy and to provide information to the U. S. Government. He did continue in this capacity and did provide such information until April 1949 when it became too dangerous for him to remain. During this period as information came to his attention, the witness made periodic reports to agents of the U.S. Government about many matters of interest to the U. S. Government, including two which referred to or dealt with the applicant.

4. In the Spring of 1948, Karas accompanied the witness to Innsbruck in the French Zone of Austria. There Karas made an excuse to separate from the witness, who then followed Karas and observed him meet the applicant in front of a downtown cafe. The witness observed them in animated conversation for a period of 10 to 15 minutes. He then left to avoid being seen by Karas. During the time he observed them together, he did not see any documents or money pass between them. Subsequently, the witness observed Karas and the applicant together at the Czech Embassy in Vienna at approximately monthly intervals through December 1948.

5. At no time did the witness see the applicant and Karas exchange any documents or money, and he was not in a position at any time to overhear their conversation. The witness has no information that the applicant was a Communist, or any information concerning the nature of the applicant's relations with Karas.

(signed)

ANDRES J. DAVIS, JR., Esq.
Counsel for Applicant

(signed)

JOHN DAVIS, Esq.
Counsel for Department of Defense

N O. 2 1 6 1 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF
DEFENSE, WALTER T. SKALLERUP, JR.,
DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

vs.

JOSEPH J. REMENYI,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Attorneys for Appellee

FILED

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WM. B. LUCK, CLERK

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Appellants,

vs.

JOSEPH J. REMENYI,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Central District of California remanding the matter to the Central Industrial Personnel Access Authorization Review Board and directing that appellee be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force [R. 254-255]. Jurisdiction below was founded upon 5 U.S.C. 1009 and 28 U.S.C. 2201-2202 [R. 2]. Jurisdiction of this appeal is conferred by 28 U.S.C. 1291.

The Jurisdictional Statement set forth in Appellant's Opening Brief pp. 1-3 is adopted by Appellee rather than being repeated

here.

STATEMENT OF THE CASE

Appellee, an American citizen, was employed by the Rocketdyne Division of North American Aviation, Inc. at Canoga Park, California, from February 6, 1959 to December 1963 [R. 184-189]. After he was first employed, Appellee applied for clearance at the "Secret" level in February 1959. He was initially granted clearance at the "Confidential" level [T. 112]. Appellee's application for clearance was made pursuant to the Industrial Personnel Security Program established by the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960. The pertinent provisions of Executive Order 10865 and of Directive 5220.6 are set forth as Appendix I to Appellants' Opening Brief.

Appellee was questioned at length by investigators representing the United States Navy and submitted to a polygraph examination in 1960 in connection with the processing of his application for clearance. In the meantime, Appellee continued working at the Rocketdyne Division of North American, Inc. Appellee established himself in the neighborhood, purchased a home and assumed there was no problem regarding his application for clearance. In November 1963 almost five years after his employment at Rocketdyne and his application for clearance, he was notified that his then existing

clearance had been revoked. Rocketdyne Division of North American Aviation, Inc. was required to terminate his employment because of his lack of clearance [R. 184-189].

Appellee requested that the matter be heard by the Field Board of the Industrial Access Authorization Review Board at the earliest possible time. The hearing was held in February 1964 and the matter is not yet resolved. Appellee has been unable to find steady employment in the United States during the last approximate four years. He could find no steady employment at all from January 1964 until January 1966 when he obtained a job with a company in West Germany [R. 113-116]. This required him and his wife to live outside the United States in Mannheim, West Germany [R. 128].

Appellee filed his complaint in the District Court on the 28th day of July, 1965, in which he alleged the procedure accorded him was violative of due process; that Appellants were without authorization to have taken the action denying him a clearance employing the procedures used; and that the action taken by the Field Examiner and Central Board had been arbitrary and an abuse of discretion. Specific matters were alleged regarding the improper admission of evidence including improper authentication of documents and lack of confrontation with the witness testifying against him [R. 2].

After a complete hearing in the court below where the entire transcript of the administrative proceedings was in evidence, the court found substantial errors in the administrative proceedings

amounting to a denial of due process. Further, the testimony of the witness testifying against Appellee was stricken from the record because of its improper admission and use based upon the government's failure to confront Appellee with the witness both in the administrative proceedings and in the court below [R. 255]. The District Court had ordered Appellants to produce their secret witness in court [R. 147]. Appellants failed to do this despite the court order. Without such purported "evidence" there is nothing in the record to support Appellants' contention that Appellee was not trustworthy and should be denied access. The only evidence properly to be considered by the administrative body hearing the matter was favorable to Appellee.

Appellee prior to, at the time of the hearing, and to the present, had been and is a loyal American citizen. He had been successful in his employment since entering this country. His employers all recommended him as a good, trustworthy employee. There was no evidence of his taking or attempting to take any secrets despite the fact he had been employed in the defense industry for several years. Appellants must not have been too concerned about his veracity and trustworthiness since they apparently had all the same information in their files since at least 1960 when he was interviewed and examined by representatives of the Navy, which examination was in part with the aid of a polygraph. After that examination and investigation Appellants permitted Appellee's then clearance to remain in effect for approximately three years and Appellee continued at the same job at the

Rocketdyne Division for which he was applying for his secret clearance.

Based upon the improper procedures taken by Appellants and the fact that there was no negative evidence in the record the court below found that the administrative determination failed to conform to the requirements of due process, was arbitrary and an abuse of discretion. In its findings of fact it listed among other things the following:

"a. [Appellee] was not permitted to confront the witness testifying against him nor to know the witness' identity;

"b. The transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;

"c. Counsel representing [appellants] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [appellee] or [appellee's] counsel and without consent on the part of [appellee] or [appellee's] counsel;

"d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board;"

The District Court further found that on the administrative record, "the granting of access authorization to [appellee] for information classified at the 'secret' level is clearly consistent with the national interests." [R. 188].

The judgment ordered the testimony of the secret witness expunged from the administrative record [R. 254-255] and "That [appellee] be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force; . . . " [R. 255], and that the matter be remanded to the administrative body for proceedings in accordance with the judgment [R. 255].

QUESTION PRESENTED

Where the administrative record contained only evidence affirmative to appellee supporting his application did the District Court have authority and jurisdiction to remand the matter to the administrative body directing that appellee be granted access to information classified as secret.

ARGUMENT

The Introduction to Appellants' Argument in their Opening Brief deals with matters which Appellants admit are not before the court on this appeal (pp. 11-14).

Appellants then argue (pp. 14-23) that the action taken by the District Court was invalid since, they contend, it improperly infringed upon the power of the Executive Branch to make decisions regarding access to classified information. Various cases are cited in support of that proposition typical of which is the Court of Appeals decision in Vitarelli v. Seaton, 253 F.2d 338. Appellants quote from that decision in their brief at page 18 as follows:

" '[i]t is not our function to decide whether appellant was or was not untrustworthy, or a "security risk". ' (253 F.2d at 343). "

However, this quotation appears in an opinion which affirms the actions of an administrative board and, therefore, only stands for the proposition that the administrative board has jurisdiction to hear the evidence and make a determination subject to review by the courts which have jurisdiction to affirm or reverse the administrative determination. On this appeal the administrative board's power to hear the case and make a determination is not at issue. This appeal concerns the nature and extent of the District Court's power to review the administrative board proceeding under the Administrative Procedure Act [5 U.S.C. §1009(e)]. Therefore, it is more notable that on appeal to the United States Supreme Court

in Vitarelli v. Seaton ^{1/} the Court reversed the holding of the Court of Appeals, held that the administrative proceeding was invalid, and, most importantly, held that the plaintiff should be reinstated in his position as a government employee.

In the case at bar the administrative board held a full hearing and made its findings. This right which is well supported in Appellants' Opening Brief was exercised by Appellants. However, after Appellants had acted adversely to Appellee, Appellee was entitled to review by the District Court pursuant to the Administrative Procedure Act, supra. On that review the Court below, after considering the entire administrative record, found no evidence supporting the administrative decision that it would not be in the national interests to grant Appellee access authorization. The Court further found that the administrative determination was arbitrary and an abuse of discretion in that it denied Appellee access authorization to information classified at the secret level. The Court, therefore, remanded the matter to the administrative board for further proceedings conforming to the judgment which included the direction that Appellee be granted access authorization at the secret level. Therefore, Appellants were not denied their right to hear and determine this case at the administrative level.

In reviewing administrative proceedings the District Court is empowered to "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of

^{1/} 359 U.S. 535 (1959).

discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute" ^{2/} and to "compel agency action unlawfully withheld or unreasonably delayed". ^{3/} This is exactly what the Court did in this case when it ruled that Appellants' actions were arbitrary and an abuse of discretion. In making that determination the District Court reviewed all the evidence which Appellants produced against Appellee to support their position that Appellee should not have secret clearance. However, as has been pointed out, there was no evidence properly in the record to justify the administrative action under the tests set forth in the Administrative Procedure Act and, on the contrary, there was overwhelming evidence to support Appellee's position. Therefore, in invalidating Appellants' proceeding which did not conform to its own rules and remanding the case to the administrative board, the Court also directed that Appellee be given access authorization for secret material. Analogous action has been taken by courts in reviewing Social Security matters and placing applicants for benefits under coverage of the Social Security Act. In Shaw v. Celebrezze, 245 F. Supp. 572, the Court found that the determination of the Secretary of Health, Education and Welfare was not supported by substantial evidence. It remanded the case to the administrative

^{2/} 5 U. S. C. §1009(e)(B).

^{3/} 5 U. S. C. §1009(e)(A).

board with directions that the applicant be placed under the Social Security Act. Similar directives were also given in other cases. ^{4/} Also, where a government employee has been discharged in an invalid proceeding, which Appellants state is an analogous situation to the case at bar (p. 18), the Court has ordered that the administrative proceeding was invalid and that the employee be reinstated in his position. Vitarelli v. Seaton, 359 U.S. 535 (1959); Cf. Service v. Dulles, 354 U.S. 363 (1957); and Peters v. Hobby, 349 U.S. 331 (1955).

More recently, in the case of Coleman v. United States, 363 F.2d 190 decided by this Court, the determination by the Secretary of the Interior was found to be arbitrary, capricious, and an abuse of discretion. The Court of Appeals remanded the entire proceeding to the Department with instructions. By analogy, the court does have jurisdiction under the holding of the Coleman case to remand in the present matter, with instructions to grant Appellee's application for secret clearance.

Government counsel raise unique problems in their brief, protesting that the doctrine of separation of powers prevents the Judicial Department from remedying a bureaucratic proceeding that is capricious, arbitrary, and an abuse of discretion. In the instant case there is no valid evidence to indicate that Appellee was or is a security risk or had ever done anything to endanger the security of

^{4/} Pellerini v. Celebrezze, 226 F. Supp. 176;
Webb v. Celebrezze, 226 F. Supp. 394;
Edwards v. Celebrezze, 220 F. Supp. 79.

the United States. The acts complained of were acts that were allegedly committed by Appellee approximately twenty years ago. The evidence given by the secret witness was expunged from the record (which the Appellants accept and do not raise on appeal). The government's complaints regarding Appellee, therefore, stand unsupported by any evidence that the appellee is untrustworthy. The government had many years to obtain valid and proper evidence to prove the charges it made in this case if there was in fact any substance to those charges.

The Court will observe in the exhibits, letters of recommendation from every company that Appellee worked for, all of which companies being either prime or subcontractors for war material, had their own security organizations, and all of whom are as anxious to preserve the national security as is the Defense Department.

In the case of Greene v. McElroy, in which the Supreme Court granted certiorari, reported in 360 U.S. 474, the Court held that the procedures of the Department of Defense relating to the Industrial Program must afford persons affected with the safeguards of confrontation and cross-examination. We submit that the record in this case indicates duress exerted by counsel for the Defense Department to compel Appellee to proceed under such circumstances as to warrant the conclusion that confrontation and cross-examination were completely denied Appellee. (See the brief by Loyd Wright attached as Exhibit "D" to the Complaint, the contents of which have not been substantially challenged by competent evidence.)

While the court in the Greene case, supra disclaimed passing upon the Constitutionality of the procedures, as the concurring opinion of Justice Harlan indicates, the court deals with the very issue it disclaims deciding, to-wit, that confrontation and cross-examination are essential to a fair hearing, and that otherwise, without these two cornerstones of protection given every citizen, the rights of Appellee have been infringed and due process denied. In the prevailing Opinion in the Greene case, it cannot be disputed but that the court considers due process to encompass the rights of the applicant under the Fifth and Sixth Amendments, and a full reading of the record in this case will sustain the conclusion of the District Court that due process was not complied with. It will also sustain the proposition that Appellee's liberty and property have been taken from him in contravention of the Fifth Amendment.

We submit a more serious question, and that is, can either the Chief Executive or the Congress take away the vested rights of an American citizen guaranteed in the Constitution and the Bill of Rights? Chief Justice Hughes raises the question [Cromwell v. Beason, 285 U. S. 57, 616] as to whether the Congress may substitute the Constitutional courts in which the judicial power of the United States is vested, with an administrative agency * * * for the final determination of the facts upon which the enforcement of the Constitutional rights of the citizen depend. This great jurist took the position that to do so would be to change the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system,

wherever Constitutional rights depend.

If under our form of government by law, the courts are denied the jurisdiction to remedy bureaucratic avariciousness and arbitrary decisions such as is apparent from the record here, then we no longer are a nation under the rule of law, but we are relegated to the unhappy plight of rule by men. Where, as here, there is no substantial evidence whatever to support the ridiculous charges of a faceless accuser, then the courts, are compelled to intervene and protect the Constitutional rights of its citizens.

CONCLUSION

We submit that after the District Court had heard all of the evidence and reviewed all of the procedural steps, that its findings and judgment should be upheld. To hold otherwise is to make a mockery of justice since this citizen has been denied his guaranteed rights for so many years by the indifferent and arbitrary action of the Defense Department. We respectfully submit that this Court remand to the Central Industrial Personnel Access Authorization Review Board, with instructions to follow the judgment of the District Court.

Respectfully submitted,

WRIGHT, WRIGHT, TOLTON & RICE
LOYD WRIGHT

and

ANDREW J. DAVIS, JR.

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Andrew J. Davis, Jr.

ANDREW J. DAVIS, JR.

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**WELLS FARGO BANK, Formerly WELLS FARGO BANK
AMERICAN TRUST CO., ETC., APPELLEE**

**On Appeal from the Judgment of the United States District
Court for the Northern District of California**

BRIEF FOR THE APPELLANT

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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,620

UNITED STATES OF AMERICA, APPELLANT

v.

WELLS FARGO BANK, Formerly WELLS FARGO BANK
AMERICAN TRUST CO., ETC., APPELLEE

On Appeal from the Judgment of the United States District
Court for the Northern District of California

BRIEF FOR THE APPELLANT

OPINION BELOW

The findings of fact and conclusion of law of the court below (R. 94-98)¹ are not officially reported.

JURISDICTION

This case involves the federal estate tax liability of the estate of Augusta W. Lachmund. The date of

¹ "R." references are to the single volume of the record on appeal.

death was February 28, 1954. The jurisdiction of the District Court to hear this refund suit is contested by the United States, appellant herein, as set forth more fully *infra*. The District Court's final judgment was entered on September 23, 1966. (R. 99-100.) Within sixty days thereafter the United States filed its timely notice of appeal on November 21, 1966. (R. 102.) This Court's jurisdiction to entertain this appeal is conferred by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Did the District Court err in holding that the right of the estate to claim a refund based upon the deduction of attorney's fees incurred in prior tax refund litigation was not barred by the estate's failure to make the claim within the time required by Treasury Regulations 105 (1939 Code), Section 81.34, and Section 910 of the Internal Revenue Code of 1939?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in Appendix A, *infra*.

STATEMENT

A federal estate tax return was filed on behalf of the estate of Augusta W. Lachmund on May 19, 1955. The Commissioner of Internal Revenue proposed a deficiency based upon his conclusion that a trust created by the decedent several years prior to her death had been established in contemplation of

death. The estate paid the proposed deficiency in full on February 25, 1957, and filed a claim for refund on May 16, 1957, which was subsequently denied. (R. 95.)

The estate filed a refund suit in the District Court for the Northern District of California on March 21, 1958. (R. 96.) Its complaint made no reference to a deduction for attorneys' fees incurred in connection with the claim or the suit. (R. 109-113.) Following a full trial, judgment for the estate was entered on September 8, 1959, and the refund was paid in full by the United States on April 26, 1960. (R. 96.)

On June 15, 1960, the estate sought authorization in state probate proceedings for the payment of attorneys' fees incurred in the course of the tax refund litigation. On June 30, 1960, the probate court entered its order authorizing the payment of \$9,321.63 (exactly 25% of \$37,286.51, the amount paid by the United States in satisfaction of the judgment in the refund suit) in attorneys' fees, \$750 in executor's fees and \$128.65 for miscellaneous costs, all in connection with the refund litigation. On July 6, 1960, those amounts were paid by the estate's executor. (R. 96-97.)

On May 1, 1961, the estate filed the present claim for refund in the amount of \$3,098.49 based upon an asserted deduction of \$10,950.28 for attorneys' fees arising from the prior and present refund claims. The Commissioner of Internal Revenue determined that the present claim was not timely filed within the period provided by law and denied it. (R. 97.) The

present refund suit, based upon the Commissioner's denial of the latter claim, was filed on February 4, 1965. (R. 1, 97.) The Government's motion to dismiss the suit on the ground that the claim had not been made within the time provided by law was denied on August 23, 1965. (R. 13-14, 44-45.)

Following a trial held on August 19, 1966, the District Court entered findings of fact and conclusions of law on September 18, 1966, in which it held that the estate's claim for a deduction based on attorneys' fees had been timely filed. (R. 94-98.) Judgment for the plaintiff was entered on September 23, 1966 (R. 99), and the United States has appealed. (R. 102.)

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in failing to conclude that the estate's right to claim a deduction for attorneys' fees incurred in refund litigation was barred upon the failure of the estate to make the claim in accordance with the terms of Treasury Regulations 105, Section 81.34 (1939 Code), and Section 910 of the Internal Revenue Code of 1939.

2. The District Court erred in concluding that the estate's right to claim a tax refund based on attorneys' fees involved in refund litigation did not arise until the State probate court authorized payment of the fees after the conclusion of the refund litigation.

SUMMARY OF ARGUMENT

The filing of a timely claim for refund is a jurisdictional prerequisite for maintaining a tax refund suit in Federal District Court. In the present case a refund was sought based upon an estate tax deduction for attorneys' fees incurred in earlier refund litigation. Under the pertinent Regulations, a refund based upon this category of expenses need not be formally filed with the Commissioner so long as it is asserted in pleadings during the course of the substantive refund litigation. The present taxpayer, however, filed its claim for refund one year after termination of the refund proceedings out of which the legal expenses arose and six years after payment of the tax against which the refund was sought. Independently of the regulation applicable to this category of claims, the statute of limitations requires that refund claims be filed within three years following payment of the tax against which the refund is sought. Thus, taxpayer's claim was not made within the time prescribed by the regulation nor was it made within the time prescribed by the statute of limitations without regard to the regulation.

The District Court reached its conclusion that the claim was not barred by the statute of limitations upon the assumption that the taxpayer had no right to claim the refund for attorneys' fees until the amount of the fees was made known and allowed in probate proceedings following termination of the refund litigation. This assumption is without legal basis. The Regulations clearly permit, and indeed re-

quire, the assertion of a refund claim based upon estimated legal expenses prior to or during the substantive refund proceedings to which they relate. The District Court, however, chose entirely to ignore the regulation and its relevance to taxpayer's claim.

It is only by reference to the regulation that taxpayer's claim may be seen as surviving the three-year limitations period following payment of the tax in May, 1955. Within that period, however, taxpayer filed its substantive refund claim to which the present claim is ancillary. The regulation regarding claims for attorneys' fees has the effect of implying an inchoate claim based on a deduction for such fees upon the filing of the substantive claim, but once the substantive claim is resolved, the ancillary claim expires in the absence of formal notice in pleadings or otherwise from the taxpayer asserting its right to claim the ancillary deduction.

ARGUMENT

Taxpayer's Claim for Refund Was Filed Beyond the Time Established by Regulation for the Filing of Such Claims, Thus Depriving the District Court of Jurisdiction to Entertain This Refund Suit

The single question in this case is whether taxpayer's claim for refund was properly denied because of taxpayer's failure to comply with the terms of Treasury Regulations 105, Section 81.34 (1939 Code) (Appendix A, *infra*), regarding the filing of claims based upon deductions for attorneys' fees incurred in prosecuting claims for refund of estate taxes. Fail-

ure to comply with valid conditions for filing a refund claim is an absolute bar to the maintenance of a suit for refund based upon the claim. Section 7422(a) of the Internal Revenue Code of 1954 (Appendix A, *infra*) provides in part that "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate, *according to the provisions of law in that regard.*" (Emphasis added.) Regulations prescribing the "time for filing any return, declaration, statement, or other document" are expressly authorized by Section 6081(a) of the 1954 Code (Appendix A, *infra*), and were also authorized by the less specific but no less comprehensive rule-making authority conferred by Section 3791(a) of the 1939 Code (Appendix A, *infra*). Valid Regulations, not inconsistent with the Code, acquire the force and effect of law. See *Douglas v. Commissioner*, 322 U.S. 275 (1944).² Thus a valid regulation which sets forth a condition of time for

² This is especially true of Regulations in effect prior to a reenactment of a revenue statute and which are not modified or disapproved of in the course of reenactment. *Cammarano v. United States*, 358 U.S. 498 (1959); *J. G. Boswell Co. v. Commissioner*, 302 F. 2d 682 (C.A. 9th 1962), certiorari denied, 371 U.S. 860; *Nutt v. Commissioner*, 351 F. 2d 452 (C.A. 9th 1965), certiorari denied, 384 U.S. 918. Section 81.34 of Treasury Regulations 105 (1939 Code), appears (with additions) as Section 20.2053-3(c) (2) of the Regulations under the 1954 Code (Appendix A, *infra*).

the filing of a particular class of refund claims is a provision of law within the meaning of Section 7422 of the 1954 Code and compliance with such a condition is a statutory prerequisite to maintaining a refund suit based upon the claim.

The present taxpayer incurred legal fees in connection with successfully contesting a tax deficiency based upon the Commissioner's assertion that a gift of the decedent had been made in contemplation of death. The decedent having died on February 28, 1954 (R. 129), prior to the adoption of the 1954 Code, the tax liability of her estate is determined under the provisions of the Internal Revenue Code of 1939 and its pertinent Regulations. Section 7851(a) (2) (A), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 7851). Section 812(b) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 812) authorizes the deduction for legal fees sought by the taxpayer in this case and no issue is raised here on that substantive question. If, however, the deduction was not claimed in the original tax return, a claim for refund based upon such expenses, as with all other claims, must have been filed "three years next after the payment of such tax." Section 910, Internal Revenue Code of 1939 (Appendix A, *infra*). Since the estate's tax return was filed and its tax was paid on May 19, 1955 (R. 95), and the present claim was not filed until May 1, 1961 (R. 97), an unrestrained application of the statute of limitations would bar the present claim outright. However, in light of the difficulty a taxpayer may experience in anticipating at

the time a refund claim is made whether its claim will be denied, the Regulations under the 1939 Code set forth the following conditions for asserting a claim based on this special category of attorneys' fees (Treasury Regulations 105 (1939 Code), Section 81.34 (Appendix A, *infra*)):

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.³

The regulation was interpreted in *Bohnen v. Harrison*, 232 F. 2d 406 (C.A. 7th 1956), to permit assertion of a refund claim based upon attorneys' fees incurred in prosecuting a substantive claim for refund for the first time in the course of the substantive refund litigation, irrespective of whether the attorneys' fees deduction was made a part of the original claim filed with the Commissioner of Internal Revenue. This construction of the regulation was codified in the Regulations under the 1954 Code with the addition of the following sentence as part of Section 20.2053-3(c)(2), Treasury Regulations on Income Tax (1954 Code) (Appendix A, *infra*), to the

³ The above-quoted language was added to Section 81.34 of Treasury Regulations 105 (1939 Code), by T.D. 5596, 1948-1 Cum. Bull. 127.

language already appearing in the earlier regulation and repeated in the new regulation:

A deduction for reasonable attorneys' fees actually paid in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed even though the deduction, as such, was not claimed in the estate tax return or in the claim for refund.

It is against the liberality of Section 81.34 that the course followed by the taxpayer must be tested. Taxpayer, although informed by the regulation that the deduction should be claimed when the refund claim is prosecuted, that it would not be questioned because of the uncertainty of the amount, and that it need not be first asserted in a claim filed with the Commissioner, nevertheless let the entire substantive refund proceeding terminate before initiating its claim for the deduction based on attorneys' fees. In circumstances almost identical to the present case, the court in *Frank v. Granger*, 145 F. Supp. 370, 373 (W.D. Pa. 1956), stated:

* * * the steps which the law says petitioner shall take to secure a deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund are a prerequisite to granting relief. The claim cannot be made afterward, at the latest it must be made during the time the refund claim is prosecuted. In this case, the adjudication was filed, the judgment then entered, an appeal taken, the appeal dismissed, and the Government paid the refund, with interest. Nevertheless, petitioners seek an

additional refund. The claim for such additional refund was not timely made.

Unless the regulation itself is invalid and the claim is not otherwise barred by the statute of limitations, taxpayer has shown no excuse or justification for ignoring the regulation, indeed if any could be shown. Insofar as the validity of the regulation is concerned, no issue regarding it was raised below and none was suggested by the District Court in its findings and conclusions.⁴ The District Court's holding, although not fully articulated, appears to rest upon its conclusion that "The right to said deduction did not arise and the estate tax paid by plaintiff was thus not overpaid until the amounts of said extraordinary fees and costs were determined and allowed by the probate court on June 30, 1960." (R. 98.) The court followed this conclusion with the unadorned assertion that the claim was timely filed and not barred by the statute of limitations. (*Ibid.*) Section 910 of the 1939 Code, however, states without qualification that claims first asserted more than three years after the tax was paid shall be barred. No exception is made for claims not known or which "did not arise" (R. 98) within the three-year period. In that respect the statute strikes a balance between the allowance of claims for a period of time thought fair and sufficient by Congress—a time period not changed upon reenactment of the Code in 1954—and the administrative

⁴ The regulation was entirely ignored by the District Court; it is nowhere mentioned or alluded to in the findings and conclusions below. (R. 94-98.)

need of taxpayers and the Commissioner to close cases. Where Congress is apprehensive that a certain category of claims may not be known within the applicable period of limitations and it wishes these claims to be allowed, it has enacted a statutory extension of the limitation period for that category of claims. See, e.g., Sections 2014(e), 2015, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 2014, 2015).

If the issue is determined only by reference to Section 910, as the District Court treated the case, and not with regard to Section 81.34 of the Regulations, there can be no question of the untimeliness of the claim. We think, however, that the District Court erred in its major premise, i.e., its holding as to when taxpayer's right to claim the deduction arose. Taxpayer had a right to claim a deduction for attorneys' fees incurred, or to be incurred, in prosecuting its substantive claim. The right to do so is made clear by Section 81.34, which directs that the claim be made at the time the substantive claim is asserted, and which permits it to be made in an indeterminate amount and without formal filing with the Commissioner. Thus from May 16, 1957, when taxpayer filed its first refund claim (R. 95), until at least September 8, 1959, when judgment was rendered in taxpayer's refund suit (R. 96), it was open to taxpayer to assert an estimated deduction for attorneys' fees incurred in prosecuting the claim.

Having failed to make the claim within the time prescribed by the regulation, taxpayer is, independ-

ently of the regulation, clearly barred by the statute of limitations. Moreover, the regulation may not be read as a waiver of the statute of limitations, thus extending indefinitely the time within which this category of claims may be asserted. The Commissioner is not empowered, except as expressly provided by statute, to waive the statute of limitations for a single claim or a category of claims. *United States v. Garbutt Oil Co.*, 302 U.S. 528, 534 (1938); see *Tucker v. Alexander*, 275 U.S. 228, 231-232 (1927). The regulation, however, is predicated on the timely filing of a preceding substantive refund claim, the claim which generates the expenses for which an estate tax deduction is sought. The ancillary claim thus draws its life from the timely substantive claim. The effect of the regulation is to imply an inchoate claim for deduction based on attorneys' fees which may be brought to fruition by the taxpayer in the course of the refund proceedings or which abates upon termination of the refund proceeding if no formal claim is made. The actual claim for the deduction, if not made simultaneously with the original claim, is thus treated as an amendment to the original claim. As such, the Commissioner has authority to allow it and to set a time limit for its filing. See *United States v. Kales*, 314 U.S. 186, 193 (1941).⁵

⁵ There is no inconsistency between this view and the position taken by the Commissioner in *Rogan v. Taylor*, 136 F. 2d 598 (C.A. 9th 1943). There the Commissioner denied a claim for an administration expense deduction, which apparently included attorneys' fees incurred in refund litigation, on the ground that when the claim for

In relating the time period for claiming deductions for attorneys fees incurred in refund litigation to the refund litigation itself, the regulation is in the nature of a codification of the doctrine of *res judicata* as it applies to refund suits. Prior to promulgation of the amended regulation, it was the Commissioner's practice to reject claims based on this category of attorneys' fees when made for the first time after the entry of judgment in refund litigation on the ground that the doctrine of *res judicata* required that all of the taxpayer's claims be asserted in a single cause of action. The Court of Appeals were sharply split on the validity of this position. Compare *Cleveland v. Higgins*, 148 F. 2d 722 (C.A. 2d 1945), and *Van Dyke v. Kahl*, 171 F. 2d 187 (C.A. 7th 1948), with *Magruder v. Safe Deposit and Trust Co.*, 159 F. 2d 913 (C.A. 4th 1947), and *Martin v. Broderick*, 177 F. 2d 886 (C.A. 10th 1949). In each case there was no question of the timeliness of the claims involved; the only issue was whether the taxpayer had a right to claim estimated attorneys' fees before the

deduction was first asserted prior to expiration of the statute of limitations it (p. 602) "did not refer to any then existing right to refund." The amendment to Section 81.34 in 1947 (T.D. 5596, 1948-1 Cum. Bull. 127), subsequent to the *Rogan* decision, plainly established the "existing right to refund" which might not have existed prior to the amendment. This Court in *Rogan* agreed with the Commissioner's position that no right to claim the refund existed at the time the claim was made, but added (136 F. 2d p. 602): "We do not mean to say that a present claim may not be predicated upon a present estimate of future expenses, a question not now before us."

first judgment was entered, a right of a character that would have barred its post-judgment assertion because it could have been, but was not, included in the first cause of action. The difficulty arose from the failure of the Regulations to state that a taxpayer could claim estimated expenses in an uncertain amount prior to entry of judgment in the first suit. Thus the courts in the *Magruder* and *Martin* cases, *supra*, held that no right to make such a claim existed until judgment was entered in the substantive refund litigation and the amounts of fees became known with certainty. Since under the amended regulation the taxpayer is both permitted and required to make the estimated claim, the earlier view of some of the courts that *res judicata* was inapplicable is no longer pertinent.⁶

Taxpayer's substantive refund claim and its first refund suit were filed within three years after pay-

⁶ In *Martin v. Broderick*, *supra*, the court considered the amendment to Section 81.34, although the case developed prior to the amendment, and stated (177 F. 2d, p. 888):

It may be that the Treasury Department is authorized by regulation to require a taxpayer to include in his claim for refund an estimated amount of the attorneys' fees he expects to claim against the estate, at the risk of being barred to later assert it.

The court added that the regulation "need not necessarily rest upon the doctrine of *res judicata*" (*ibid*) in the sense that the new regulation did not invoke a pre-existing but unarticulated doctrine which independently of the regulation would bar the claim before the court in that case. We think the regulation does embody the doctrine of *res judicata*, but in a way that fairly informs taxpayers of when the claims must be made.

ment of the tax against which its present claim is asserted. Thus we need not deal with the applicability of the statute of limitations to claims based upon attorneys' fees which are made simultaneously with the substantive refund claim, and within the terms of the regulation, but which are made more than three years after payment of the tax. In such cases the timeliness of the substantive claim with respect to payment of a deficiency cannot, without a distortion of the statute of limitations, render as timely with respect to the original payment of the tax a claim based on attorneys' fees. The difficulty of this circumstance has led one court to conclude that the statute of limitations does not apply at all to claims in that category. *Duncan v. United States*, 148 F. Supp. 264 (Mass. 1957). In *Duncan*, unlike the present case, the taxpayer did all he had to do to qualify under the regulation. Since the present taxpayer has not followed the simple course set forth in the regulation and, again unlike the taxpayer in *Duncan*, did file its first refund claim within three years after payment of the original tax, this Court need not consider the unsupported assertion of the court in *Duncan* that the statute of limitations does not apply to the class of claims there considered.

The filing of a timely refund claim is a prerequisite to federal jurisdiction to entertain a refund suit based upon the claim. *Noland v. Westover*, 172 F. 2d 614 (C.A. 9th 1949), certiorari denied, 337 U.S. 938; *Rogan v. Ferry*, 154 F. 2d 974 (C.A. 9th 1946). Since taxpayer's claim was not timely filed or otherwise as-

serted as required by law, its suit should have been dismissed below.

CONCLUSION

The judgment of the District Court should be reversed and the case dismissed.

Respectfully submitted,

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Of Counsel:

CECIL F. POOLE,
United States Attorney.

July, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of July, 1967.

LOUIS M. KAUDER
Attorney

APPENDIX A

Internal Revenue Code of 1939:

SEC. 910. PERIOD OF LIMITATION FOR FILING CLAIMS.

All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund. (26 U.S.C. 1952 ed., Sec. 910.)

SEC. 3791. RULES AND REGULATIONS.

(a) *Authorization.*—

(1) *In general.*—Except as provided in section 1928(a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * * *

(26 U.S.C. 1952 ed., Sec. 3791.)

Internal Revenue Code of 1954:

SEC. 6081. EXTENSION OF TIME FOR FILING RETURNS.

(a) *General Rule.*—The Secretary or his delegate may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months.

* * * *

(26 U.S.C. 1964 ed., Sec. 6081.)

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * *

(26 U.S.C. 1964 ed., Sec. 7422.)

Treasury Regulations 105 (1939 Code):

§ 81.34 [as amended by T.D. 5596, 1948-1 Cum. Bull. 127]

Attorney's fees.—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

Attorney's fees incurred by beneficiaries incident to litigation as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly

charged against the beneficiaries personally and are not administration expenses.

Treasury Regulations on Estate Tax (1954 Code) :

§ 20.2053-3 *Deduction for expenses of administering estate.*

* * * *

(c) *Attorney's fees.*

* * * *

(2) A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time the deficiency is contested or the refund claim is prosecuted. A deduction for reasonable attorney's fees actually paid in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed even though the deduction, as such, was not claimed in the estate tax return or in the claim for refund. A deduction for these fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

* * * *

(26 C.F.R., Sec. 20.2053-3.)

APPENDIX B

Table of Exhibits pursuant to Rule 18(2)(f) as amended (page citations are to the trial transcript):

<u>Plaintiff's Exhibits</u>	<u>Identified</u>	<u>Admitted</u>
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No. 21,620

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

WELLS FARGO BANK, Formerly WELLS
FARGO BANK AMERICAN TRUST CO., ETC.,

Appellee.

Brief of Appellee

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JURISDICTION

This case presents the allowance of an ancillary request for fees of an estate representative, incurred in successful litigation conducted on a timely claim for refund. The trial court (Judges Harris and Burke), on Motion to Dismiss and on the trial, decided in favor of taxpayer. The District Court entered judgment in favor of taxpayer and against appellant, for the sum of \$3,098.49. (R. 99, 100). This represented fees claimed as a deduction for extraordinary attorneys' and executor services and costs incurred in prosecuting the prior refund claim. (R. 97, 98)

FACTS

Certain concessions made by appellant will serve to place into proper perspective the facts which appellant sets forth in its brief.

First, appellant concedes respondent's substantive right to a deduction for extraordinary fees in prosecuting its prior claim for refund. (R. 31/26-32/12). Second, appellant concedes that under its own Regulations, and despite the express wording of former Section 910 and Section 7422, no prior claim for refund based upon a tax deduction for such fees need be filed within three years of filing the estate tax return in order to invoke the jurisdiction of the Court in a subsequent suit to recover the deduction refund. (AOB 10). Third, appellant concedes that a demand for such fees as a deduction may be made "ancillary" to the substantive claim for refund by allegations in the prior refund suit, and that, despite the ephemeral character of such a demand as a "claim," this demand may be "deemed" an amendment to the substantive prior claim and that "The ancillary claim draws its life from the timely substantive claim." (AOB 13).

In our case, the facts are that a timely substantive prior claim was filed, and that thereafter claim was made for the fees incurred therein, but perforce only *ancillary* to the prior substantive claim. No harm or injury or prejudice to the government could have resulted; nor was any claimed to have inured as a result of respondent's procedural approach. And indeed, until the Probate Court made its order fixing extraordinary fees on June 30, 1960, a deduction therefor did not exist, even if respondent were to have made its ephemeral "ancillary" demand in the prior substantive refund case.

No good reason appears why respondent's second claim for refund cannot be deemed "ancillary" to the substantive

claim for refund. It would and draw its life therefrom as effectively as an ephemeral demand in prior pleadings. It could be treated in all respects as an amendment to the original claim. The right to refund in either case would become fixed on the same date, June 30, 1960, following the federal litigation when the State Probate Court, by its order, created the right to such deduction. Appellant's hypertechnical objections to such treatment of the case was not given weight, either by Judge Harris on appellant's jurisdictional argument on motion to dismiss (R. 44), nor by Judge Burke on appellant's statute of limitations argument at the trial. (R. 94).

QUESTION PRESENTED

May attorney and executor fees for prosecuting federal litigation on a claim for tax refund be allowed as a deduction where such fees were not known nor reasonably estimable nor judicially determinable until a subsequent hearing and approval in state court probate proceedings, and which hearing could not be held until after final judgment in said prior tax litigation?

ARGUMENT

- I. Taxpayers Original Claim for Refund in the Prior Litigation Was Timely Filed. The Subsequent Claim for Fees Draws Its Life from the Prior Substantive Claim for Refund and Should Be Deemed an Amendment Thereto.**

It is important in this case to look through the form to the substance. Despite the imperative wording of Sections 910 and 7422, the courts have allowed recovery of taxes paid even though no formal claim for refund, as such, was timely filed. To be sure, this has been done by way of legal sanction, but it has been done, nevertheless. See *U.S. v. Kales*, 314 U.S. 186. And, indeed, the Commissioner himself has sanctioned such a solution. The situation pre-

sented by the instant case was authorized under Treasury Regulation 105, Sec. 81.34, wherein a mere pleading allegation in the prior litigation is deemed an amendment to a prior formal substantive claim. (AOB 13).

Why should not a similar sanction be invoked in our case? As Judge Burke pointed out (R. 35), no cause of action for refund arose until June 30, 1960. Hence, the general rule applicable to statutes of limitations should equally apply here, namely, that the statute commences to run upon accrual of the cause of action. We are well within that period. *Reeves v. U. S.*, 154 F. Supp. 673.

II. Appellant Has Failed to Observe the Basic Purpose of the Claims Statutes.

In denying taxpayer's claim for refund covering said fees and in contesting suit thereon and in bringing this appeal, appellant has failed to observe the basic purpose of the claim statutes and regulations as that purpose has been set forth in many interpretive cases.

The rationale which both the Courts and the Commissioner have relied upon to dispose of the statutory requirement of a formal claim for refund, based on an award of extraordinary fees, is equally applicable to appellant's limitations contention, as it is to its *res judicata* contention.

The purpose of the statute (Section 910 of the Internal Revenue Code of 1939) and of the regulations is to apprise the Commissioner of Internal Revenue the exact basis of each ground on which a refund is claimed so that he may investigate the facts and make his decision. *Rogan v. Ferry*, 154 F.2d 974; *First National Bank of Birmingham v. U. S.*, 25 F. Supp. 816; *McMahon v. U. S.*, 172 F. Supp. 490; *Ronald Press Co. v. Shea*, 114 F. 2d 453. Ordinarily, an essential

condition precedent to the right to recover by suit is a claim for refund which sets forth all the material facts which form the basis of the action to be brought. *U. S. v. Felt and Tarrant Co.*, 283 U.S. 269.

The statute and regulations governing claims are devised for the convenience of government officials in passing on claims for refund and in preparing for trial. They are not traps for an unwary client. *Rogan v. Ferry*, 154 F. 2d 974.

In disregard of this purpose, the appellant now contends that the regulations require the assertion by an estate representative of such a refund claim prior to or during the substantive refund proceedings to which they relate, and regardless of whether the taxpayer has sufficient information then to set forth the facts called for in the claim form.

Suffice to answer that the cases interpreting Treasury Regulation 81.34 and the addition made in the Regulation by 26 C.F.R., Section 20.2053-3, do not support the government's contention.

The decisions resolve an apparent conflict between the requirement, on the one hand, that a claim must be filed setting forth the facts upon which the refund is based, and, on the other hand, the language of Section 81.34 stating that the sufficiency of a claim for refund shall not be questioned solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

Cleveland v. Higgins, 148 F. 2d 722, and *Van Dyke v. Kahl*, 171 F. 2d 187, seem to conflict with *Magruder v. Safe Deposit and Trust Co.*, 159 F. 2d 913, and *Martin v. Broderick*, 177 F. 2d 886. Because of this they serve to illustrate that the appellant is placing an improper interpretation upon Section 81.34.

In the *Cleveland* and *Van Dyke* cases a subsequent claim for attorney fees incurred in the prior litigation of a refund claim was denied because it was not presented before final judgment in the original refund suit, while in *Magruder* and *Martin* a subsequent claim for attorney fees incurred in the prior litigation of a refund claim was allowed after final judgment in the original refund suit. The distinction is that in *Cleveland* and *Van Dyke* the attorney fees could have been estimated easily prior to termination of the original litigation, while in *Magruder* and *Martin* the attorney fees could not be estimated until final disposition of the case and ultimate determination by the state court having jurisdiction in probate of the estate, as in our case.

Thus in *Cleveland* and *Van Dyke*, before final judgment in the original refund suit the taxpayer could apprise the Commissioner of the factual basis upon which the attorney fees were based and also could give a reasonably accurate estimate of the amount of the fees. On the other hand, in *Magruder* and *Martin*, the taxpayer did not know the factual basis upon which to support any attorney fees until final determination of the suit. Until hearing and determination of fees by the state court the taxpayer could make no adequate estimate of the attorney fees which the probate court would, in fact and finality allow.

Martin v. Brodrick, 177 F. 2d 886, 887, (followed in our case) considered *Cleveland* and *Van Dyke*, and pointed out:

“With deference to the reasoning of these two great courts, it is difficult for us to discern how the taxpayer could, with any reasonable degree of certainty, estimate the amount of attorneys’ fees which had not been earned, and which would not be earned until final disposition of the claim. It is still more difficult for us to impute to the taxpayer the duty of anticipating what the Kansas probate court would ultimately de-

termine to be a reasonable fee for any services which might be performed. Only the Kansas court with jurisdiction of the estate was authorized to allow such attorneys' fees 'as shall be just and reasonable.' Sec. 59-1717, Kan. G. S. 1947 Supp. The court in the first action was without jurisdiction to fix the attorneys' fees or to deduct them from the estate until the services had been rendered and their reasonable value determined in another forum."

After the litigation had been commenced in the *Martin* case, Section 81.34 was amended to provide the attorneys' fees in prosecuting a refund claim "... should be made at the time of . . . prosecution, but shall not be denied or questioned solely because the amount of such fees was not established at the time claim was made." The court correctly concluded that the addition to the regulation did not indicate an administrative disposition to apply the doctrine of *res judicata* but at most indicated a prior disposition on the part of the Commissioner to deny such claims when vague or uncertain.

The principles laid down by these four cases make it abundantly clear that a correct interpretation of Section 81.34 indicates that it merely qualifies the general requirement that a claim must set forth the basis of the refund to such a degree that the Commissioner may investigate the facts relative thereto and make his decision accordingly. All 81.34 did was to clarify that the Commissioner could not deny a claim on the ground of uncertainty where the fees to be paid were not established at the time that the right to the deduction was claimed.

In *Martin* and *Magruder* not only were attorney fees incapable of estimation prior to final determination of the original refund suit but they also were not judicially determinable until hearing and approval by the state probate

court having jurisdiction, as in our case. Thus, before final determination by the state court, it was impossible for taxpayer to set forth the basis of the attorney fees so that the Commissioner could investigate and make his decision.

Section 81.34 did not contain the language regarding a deduction for attorneys fees when the above four cases were decided. The language from these cases indicated, however, that they were aware of the change in 81.34 and the holdings therein support the above interpretation of 81.34.

There was ample affirmative evidence in our case to show that fees could not have been estimated prior to final determination of the refund suit, and that a subsequent hearing and determination of the state probate court having jurisdiction was necessary.

This evidence in our favor was overwhelming. Henry C. Clausen, attorney for the taxpayer, was called as a witness and testified:

“My recollection in that regard of which you are speaking is that I then assumed I was dealing with an entirely different matter, I was dealing with prospective litigation and until that litigation was determined by final judgment no estimate could be made of what, if anything, any probate court, which was a court of a different forum than this Federal Court, might award. Even if I succeeded in the litigation, in the law of California it was my understanding that the probate court had jurisdiction to grant or withhold compensation for what it might determine was extraordinary services, and until there was a conclusion of the federal action and a submission of my services to the probate court in this other forum no estimate reasonably could be made for the reason I stated. That was my understanding.” (R. 26/25-27/13).

“THE COURT: It is quite apparent that on May 19, of 1955, when the estate tax return was filed, there was no way of anticipating an adverse reaction in the Internal Revenue Service with regard to what was alleged to have been a non-taxable transfer, that is a transfer not in contemplation of death.

“THE WITNESS: That is correct, Your Honor. In that regard we had staff conference meetings with the Internal Revenue Service, and it was my hope that the point we urged would be decided favorably to us and that there would be no litigation. In other words, I presented evidence similar to that which later was presented to Judge Harris; I presented it to the staff, the appellate staff, I believe, of the Internal Revenue Service.” (R. 30/24-31/11).

III. Taxpayer's Procedure Has Been Sanctioned by Treasury Department Amendments, Forms and Construction.

Our interpretation of 81.34 is further supported by the sentence which was added to § 81.34 by Section 20.2054-3(c) of the Treasury Regulations on Income Tax (1954 Code). Thus it is now provided that “A deduction for reasonable attorneys fees *actually paid* in contesting an assessed deficiency or in prosecuting a claim for refund will be allowed even though the deduction, as such, was not claimed in the estate tax return or in the claim for refund.”

This addition was made to cover the situation here. In the instant case taxpayer could not even estimate attorney fees until the original refund litigation was finally determined and the state court having jurisdiction determined the fees. At that time, and only at that time, taxpayer was able to determine fees. The fees the state court awarded were the fees *actually paid*. Certainly under 20.2053-3 taxpayer would be entitled to recover here.

Appellant's contention that 20.2053-3(c)(2) is a codification of the construction placed on 81.34 by *Bohnen v. Harrison*, 232 F. 2d 406, (AOB 9, 10), is not supported by a reading of the case. *Bohnen* held that a claim for attorney fees was timely under 81.34 where it was made in the complaint filed in the original refund suit.

The court was merely following the principles laid down in *Cleveland* and *Van Dyke* that where attorney fees are capable of estimation before final judgment some claim must be made before that time. At the time of final judgment in *Bohnen*, attorney fees were reasonably estimable as shown by the fact that attached to plaintiff's motion for judgment was a recomputation of the estate tax which included a deduction based upon attorney fees incurred in that suit.

The court was not considering a situation where attorney fees had been *actually paid*. It should be emphasized that the court was not considering a situation where attorney fees were not known nor reasonably estimable until final judgment in the refund suit and a subsequent hearing and determination of the state court having jurisdiction of the estate.

In this regard the circumstances here are not almost identical to *Frank v. Granger*, 145 F. Supp. 370, as appellant contends. (AOB 10) In the *Frank* case attorney fees were not determined by a state court after final judgment in the refund suit. The court correctly determined that since attorney fees could be estimated at the time of final judgment the contents of the order for judgment did not amount to a claim for refund at the time such refund claim was prosecuted.

Finally reference should be made to the appellant's own refund form 843. Taxpayer used this form when filing his original claim for refund. Instruction 1 of said form pro-

vides that "The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commission of the exact basis thereof." (R.7) In view of appellant's own instructions it seems logical to interpret 81.34 as only requiring a claim for fees when the fees are capable of estimate before final judgment. When no estimate can be made before final judgment then taxpayer is not barred by § 81.34 from recovering the fees *actually paid* after they have been determined by the state court having jurisdiction of the estate.

IV. Taxpayer's Position, in Light of the Special Situation Presented, Is Fully Supported in Reason and in Law.

The same principle that was followed in *Duncan v. U. S.*, 148 F. Supp. 264, should apply here.

In that case, an executor successfully brought an action for refund of payment of an estate tax deficiency assessed on the basis of the inclusion of a trust in the estate by the Commissioner. The executor also claimed an overpayment based on his claim for a deduction for attorney fees incurred in connection with his claim for refund.

The U. S. objected to the allowance of the latter claim because § 910 provided that the amount of any refund shall not exceed the portion of the tax paid during the three years preceding the filing of the claim. The original estate tax payment was made in 1948 and the only payment of tax within three years preceding the filing of the claim was the deficiency assessment which was fully recovered when the court determined that the trust should not have been included in the estate.

After citing 81.34 (before the additional sentence was added) and *Bohnen v. Harrison* holding that under this

81.34 it was sufficient to claim a deduction for attorney's fees in the complaint in an action brought to recover an alleged overpayment even though no claim for attorneys fees had been included in the original refund claim, the court reasoned as follows:

"Thus it would seem that the claim for attorneys' fees for prosecuting a refund claim, so far as the time for making the claim is concerned, is governed by the special provision of §81.34(b) of the Regulations, and not by § 81.96 of the Regulations and § 910 of the Code, on which § 81.96 is based. It would seem reasonable that § 910 should likewise be held not to bar recovery of an overpayment resulting from the deduction of such fees.

"[9.10] The taxpayer, of course, has no right to the deduction of attorneys' fees until such expense has actually been incurred. Where, as here, taxpayer pays a deficiency assessed after payment of the original tax, and then claims a refund, he still does not know, until the claim is rejected, whether he will ever have to incur the expense of prosecuting an action to recover the payment. At best, he can only go through the formality of claiming a refund based on a deduction to which he might become entitled sometime in the future. The strict application of § 910 would result in an inequitable treatment of such claims for deduction. A taxpayer such as plaintiff here who prevails to the extent of recovering the full amount of the deficiency payment made within the three years before the filing of his refund claim would be denied a deduction for attorneys' fees while the litigant who recovers less than the full amount of his claim might be able to secure the deduction. A taxpayer who has filed his return and paid his tax might receive a deficiency assessment notice on the last day of the three-year period following payment. In order to make sure that he would not find himself in the position of plaintiff here, he should, on the government's interpretation of § 910, file on that

same day a claim for refund for the attorneys' fees he might incur several years later, if after paying the assessment he should decide to seek a refund, and then, in case the refund should be denied, he should decide to bring suit to recover the payment. Congress cannot have intended § 910 to require the taxpayer to indulge in such a futile formality in order to protect his right to a deduction to which he may in the future become entitled. The limitation on the amount of refund under § 910 does not require the denial to plaintiff here of the recovery based on the allowance of a deduction for attorneys' fees for the prosecution of his claim for refund simply because he recovers the full amount of his claim and thus the full amount he has paid in the three years preceding his claim for refund."

CONCLUSION

For all the reasons foregoing, the judgment of the District Court should be affirmed.

Respectfully submitted,

HENRY C. CLAUSEN
CLAUSEN & CLAUSEN

Attorney for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules, 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: August 28, 1967

HENRY C. CLAUSEN
CLAUSEN & CLAUSEN

Attorney for Appellee

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Appellees

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OPINION BELOW

The District Court wrote no opinion. Its order (I-R. 57)^{1/}
adopting the findings of the Referee in Bankruptcy is not officially
reported.

^{1/} "I-R." references are to Volume I of the Transcript of Record,
as supplemented on January 19, 1968.

JURISDICTION

This appeal involves the allowability in bankruptcy of federal income tax and renegotiation claims against Trans-Pacific Corporation and its wholly-owned subsidiary, Communications Equipment Corporation for the taxable year ending September 30, 1944. The appellant is the residual beneficiary of these two corporations. (I-R. 86.) The orders of the Referee in Bankruptcy were issued on December 29, 1965 (I-R. 24-27) and affirmed by the District Court on October 31, 1966 (I-R. 57). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1334. Within sixty days thereafter, on November 29, 1966, a notice of appeal was filed. (I-R. 58.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether Section 403 of the Renegotiation Act, which vests exclusive jurisdiction with the Tax Court to review final orders of the Renegotiation Board, precludes a bankruptcy court from reviewing the merits of a final order of the Renegotiation Board.
2. Whether the claims of the United States are barred by reason of laches.

STATUTE INVOLVED

Renegotiation Act, c. 247, 56 Stat. 226, 245, as amended by Sec. 701(b), Revenue Act of 1943, c. 63, 58 Stat. 21, 78:

Sec. 403. * * *

*

*

*

(c)(1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and

subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *

* * *

(e)(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermine by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

* * *

STATEMENT

On October 29, 1946, the proceedings leading to the instant appeal were initiated by the filing of petitions under Section 322 of Chapter XI of the Bankruptcy Act against Trans-Pacific Corporation and three of its wholly-owned subsidiaries, Communications Equipment Corporation, Columbia Stamping and Manufacturing Corporation, and Neubart Stamping and Manufacturing Corporation. In these proceedings, the United States invoked substantial tax and renegotiation claims against all four companies. Through the efforts of the Trustee in Bankruptcy and others, the Government claims against Columbia and Neubart were settled. But similar settlement efforts with respect to Trans-Pacific and Communications Equipment were unsuccessful. (I-R. 85.)

Both Trans-Pacific and Communications Equipment were adjudicated bankrupts on February 28, 1947. (I-R. 85.) The protracted negotiations and litigation that followed concerning the Government's claims against these two companies culminated in two orders and two judgments of the Bankruptcy Referee in favor of the Government (I-R. 24-27), which have subsequently been affirmed by the District Court (I-R. 57):

Trans-Pacific Corporation

Tax claims	\$ 11,194.88
Renegotiation claims	\$110,517.15 <u>2/</u>

Communications Equipment Corporation

Tax claims	\$128,477.80
Renegotiation claims	<u>\$246,537.75</u>
	\$496,727.58

The appellant in this case, P. S. Seymour-Heath, is the residual beneficiary of any assets remaining after all debts of the bankrupts are satisfied. Mr. Seymour-Heath acquired this status by an order of the Referee in Bankruptcy 3/ on October 20, 1959. (I-R. 15.) Such order resulted from conflicting claims as to the ownership of stock in American Pumice Company--Mr. Seymour-Heath claiming that he owned all of the Pumice stock while the Trustee in Bankruptcy claimed that Pumice was a wholly-owned subsidiary of Trans-Pacific and, accordingly, its assets should be used for the

2/ The amount of the order against Trans-Pacific was \$357,054.90 but this included the \$246,537.75 renegotiation claim against Communications Equipment since under a 1945 agreement Trans-Pacific guaranteed the debt of its subsidiary. (I-R. 89,91.)

3/ During the pendency of these bankruptcy proceedings there were five different referees. The referee issuing the above order was John Bergener. The last referee, whose findings are here being contested, was James Moriarty.

benefit of Trans-Pacific's creditors.^{4/} The order transferred the American Pumice stock to the Trustee in Bankruptcy and, at the same time, made Mr. Seymour-Heath the residual beneficiary of the assets of both Trans-Pacific and American Pumice. (I-R. 86.) In this capacity, this Court has allowed Mr. Seymour-Heath a veto power over settlement negotiations between the Government and the Trustee in Bankruptcy. See P. S. Seymour-Heath v. George T. Goggin, decided January 10, 1968 (C.A. 9th, No. 21,868).

Our effort in summarizing the happenings of more than twenty years of bankruptcy proceedings will, as is appropriate, be limited to those facts necessary to resolve the two issues raised in the appellant's brief. Accordingly, the following are the relevant facts, which facts do not appear to be in dispute:

TAX CLAIMS

The initial federal tax claims against the bankrupt corporations, Trans-Pacific and Communications Equipment, were filed on December 18, 1946. (I-R. 87,88.)

^{4/} The only asset of any value available to meet the Government's claims herein is a right of reimbursement arising out of the Government's condemnation actions filed in 1944 and 1945 against certain mineral lands owned by American Pumice. (I-R. 85-86.) On November 24, 1964, the District Court awarded judgment in favor of American Pumice totaling \$167,250. (I-R. 30.) The Government is presently appealing the decision to this Court (United States v. American Pumice Co. (No. 20,290)).

The initial claim against Trans-Pacific, in the amount of \$66,436.33 and covering its fiscal year ending February 28, 1945, was subsequently reduced to the finally allowed figure of \$11,194.88 by a combination of a second Government audit, an allowance of loss carrybacks for 1946 and 1947, certain renegotiation credits, and the referee's resolution of several disputed issues in favor of Trans-Pacific. (I-R. 73-79,88.) The complex details of this reduction process are recounted by the referee in his findings but are omitted here because the appellant does not raise any issue with respect to those findings.

Communications Equipment reported an excess profits tax liability of \$261,787.25 on its return for the fiscal year ending September 30, 1944. (I-R. 80.) The total Government tax claim as amended on April 19, 1955 totaled \$335,522.42. This indebtedness was reduced by a payment of \$127,307.34 and a subsequent computation to a final amended claim of \$128,477.80 that was filed on April 6, 1961. (I-R. 87.) The taxpayer initially attempted to contest this liability by attempting to make use of certain tax credits due to unusual factors arising out of the war effort pursuant to Section 722 of the Internal Revenue Code of 1939. An application for relief was filed under that section on March 17, 1945 (I-R. 81), but such application was rejected by the then Bureau of Internal Revenue on January 14, 1946 (I-R. 88). No subsequent attempt was made to seek review of that rejection in the Tax Court. Moreover, no evidence in

support of the application of Section 722 was offered to the referee. The amended Government claim of \$128,477.80 was accordingly allowed in full. (I-R. 82, 88.) Again, further details are unnecessary because the appellant raises no question as to the correctness of this tax claim in his brief.

RENEGOTIATION CLAIMS

On November 26, 1945, Communications Equipment and the Government entered into an agreement with respect to that corporation's renegotiation liability fixing the amount of the liability at \$169,499.30 for fiscal year ending September 30, 1944, such agreement being executed by Mr. Seymour-Heath as the chairman of the board of directors of Communications Equipment.^{5/} As part of the settlement the parent corporation, Trans-Pacific, guaranteed payment of the agreed sum to the Government. (I-R. 71, 89.)

On May 23, 1947, the War Contract Price Adjustment Board, acting under the authority of the Renegotiation Act, c. 247, 56 Stat. 226, 245, as amended (50 U.S.C. Appendix 1964 ed., Sec. 1191) made a unilateral determination that Communications Equipment was further liable in the amount of \$70,000 for contract renegotiation

^{5/} The interest on this unpaid amount to and including October 28, 1946, the day before bankruptcy proceedings were instituted, added another \$7,038.45 to the taxpayer's bill. (I-R. 71.)

during the fiscal year ending September 30, 1945 (I-R. 71, 89), and that Trans-Pacific was itself independently liable for contract renegotiation in the amount of \$110,517.15 (I-R. 90).

The Government filed its first claim against Communications Equipment with the Trustee in Bankruptcy on January 29, 1947, and later filed several amended claims, the final one being filed on August 5, 1960, in the amount of \$246,537.75. (I-R. 89.) The Government's first renegotiation claim against Trans-Pacific in the amount of \$1,009,720.08 was filed on July 3, 1947, but subsequent amendments reduced the total to \$357,054.90, the final amended claim being also filed on August 5, 1960.^{6/} (I-R. 90.)

Neither taxpayer sought review in the Tax Court with respect to any of the renegotiation determinations of the War Contract Price Adjustment Board within the 90 days provided for that purpose in the Renegotiation Act. For this reason, the referee refused to reopen the merits of the Board's decisions and allowed the Government already-adjudicated claims in the amounts as finally amended. (I-R. 71-72, 89-90.)

^{6/} This \$357,054.90 is overlapping to the extent of Communications Equipment's \$246,537.75 renegotiation liability. See footnote 2, supra.

SUMMARY OF ARGUMENT

This appeal involves a dispute as to the validity of certain federal renegotiation claims, filed with the Trustee in Bankruptcy, both with respect to their finality and the timeliness of their enforcement. Although numerous other errors are assigned in the appellant's designation of points on appeal, only these two are asserted on brief, neither of which has any merit.

Appellant's attempts to relitigate before the Referee in Bankruptcy the merits of a final action of the War Contracts Price Adjustment Board must fail by the plain language of the federal statute creating that Board. The statute provides for exclusive review of the Board's orders in the Tax Court. And both the Supreme Court and this Court have so interpreted it.

Appellant's further attempt to apply the doctrine of laches against the Federal Government must also fail. Not only is this doctrine inapplicable against the sovereign but the appellant has not supplied even a single instance where the Government has caused an inexcusable delay in enforcing its claims to his prejudice, both preconditions to applying laches against anyone.

Accordingly, the action of the District Court in approving the referee's allowance of the Government's tax and renegotiation claims should be sustained by this Court.

ARGUMENT

THE DISTRICT COURT'S ORDER CORRECTLY ALLOWED
TAX AND RENEGOTIATION CLAIMS OF THE UNITED
STATES TOTALING \$496,727.58 AS FIXED BY THE
REFEREE IN BANKRUPTCY

This appeal challenges the correctness of the bankruptcy referee's determinations relating to the federal tax and renegotiation liability of Trans-Pacific and its wholly-owned subsidiary, Communications Equipment. Since the appellant in this case, P. S. Seymour-Heath, is the residual beneficiary of the assets of these bankrupt corporations and not a competing creditor, there is no issue as to priority. Thus, this Court need only consider the validity of the several federal claims allowed by the referee.

On brief (pp. 8-11) the appellant offers two reasons for reversal. He contends that he should be given an opportunity in the bankruptcy proceedings to relitigate the merits of the renegotiation liability. He also urges that the United States be barred from enforcing its, now stale, renegotiation claims by reason of laches. We will demonstrate that both of these arguments are equally without merit, as they have been consistently rejected by the Supreme Court, this Court and every other court having occasion to consider them. Indeed, appellant has been unable to cite a single case which supports either of his arguments.

Although the appellant has enumerated additional grounds for reversal in his designation of points on appeal (I-R. 63-64), his brief is limited to the above two grounds. By failing to argue, or even mention the other grounds in his brief, the appellant must be held to have abandoned them. Moore v. Tremelling, 100 F. 2d 39, 43 (C.A. 9th, 1938); Bank of Eureka v. Partington, 91 F. 2d 587 (C.A. 9th, 1937); Mutual Life Ins. Co. v. Wells Fargo Bank and Trust Co., 86 F. 2d 585 (C.A. 9th, 1936). See also Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18(2)(d). Accordingly, the appellant necessarily concedes the correctness of claims not within the scope of the two grounds for reversal stated in his brief, to wit, the tax claims against each corporation. Our brief, therefore, will only deal with the contested renegotiation liability.

- A. The Bankruptcy Court lacks jurisdiction either to determine the merits of a renegotiation claim in the first instance or to review a renegotiation claim already adjudicated before the Renegotiation Board

The renegotiation claims that the Government seeks to uphold in this Court arose under the Renegotiation Act, 2. 247, 56 Stat. 226, 245, as amended (50 U.S.C. Appendix 1964 ed., Sec. 1191), supra. That Act provided for the creation of a War Contracts Price Adjustment Board (hereinafter referred to as Renegotiation Board) to which was delegated the authority to determine the existence of excess war profits in Government contracts. Pursuant to this grant

of authority the Renegotiation Board determined on May 23, 1947, that Trans-Pacific owed the Government \$110,517.15 and Communications Equipment owed the Government \$70,000. (I-R. 89, 90.) The remaining renegotiation liability against these bankrupt corporations arose out of an agreement with the Government whose validity went unchallenged in the appellant's brief.^{7/}

The Renegotiation Act further provides for a review de novo before the Tax Court of the Renegotiation Board's determinations within 90 days of such determinations. Section 1191(e)(1). The instant taxpayers did not seek this available review. As a consequence the Act provides, as follows (Section 403(c)(1)):

In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order [of the Renegotiation Board] shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.

This Court has unanimously held that the above language vests exclusive jurisdiction in the Tax Court to review orders of the Renegotiation Board, and that, accordingly, District Courts cannot

^{7/} Under the statute there are two ways in which the Board can determine liability--by an agreement with the contractor or by a unilateral order. Section 403(c)(1). The Board's action here was by unilateral order. The agreement was one between the Government and the contractor prior to the Board's consideration of the case. Accordingly, this was not appealable anywhere.

consider any matters which were, or might have been, considered by the Tax Court in their review. Rushlight v. United States, 259 F. 2d 658 (C.A. 9th, 1958), certiorari denied, 359 U.S. 952; Sampson Motors, Inc. v. United States, 168 F. 2d 878 (C.A. 9th, 1948); Pownall v. United States, 159 F. 2d 73 (C.A. 9th, 1947), affirmed, 334 U.S. 742 (1948); United States v. Bonnell, 180 F. 2d 145 (C.A. 9th, 1950).^{8/}

Nor can a litigant raise a constitutional objection to the renegotiation procedure. In Lichter v. United States, 334 U.S. 742 (1948) the Supreme Court held that the requirement to go to the Tax Court for a redetermination of excess profits accords a litigant procedural due process. And this Court in Spaulding v. Douglas Aircraft Co., 154 F. 2d 419 (C.A. 9th, 1946) held that the de novo redetermination of excess profits by the Tax Court had all the essentials of due process in spite of the lack of an appeal to a federal court and thus the finality of the Tax Court's decision as to the amount to be recaptured violated no constitutional right.

^{8/} In view of the statutory provision for the status to be accorded to an unappealed unilateral determination of the Renegotiation Board, the court in United States v. Scandia Mfg. Co., 101 F. Supp. 583 (N.J., 1952) held that even the defense of the statute of limitations may not, therefore, be presented in the District Court.

This exclusive jurisdiction of the Renegotiation Board and the Tax Court in renegotiation matters applies, as well, in bankruptcy proceedings. A Trustee in Bankruptcy is precluded under the clear terms of the Renegotiation Act from asserting any defense to a renegotiation claim that has already become final under the Act. His remedy, as is the case for others, is to participate before the Renegotiation Board and, if unsuccessful, to seek review in the Tax Court. See United States v. Paddock, 178 F. 2d 394, 399 (C.A. 5th, 1949), certiorari denied, 340 U.S. 813 (1950).

The only case cited by the appellant to support his attempt to relitigate the merits of the renegotiation claims in the bankruptcy proceedings, In the Matter of Pacific Automation Products, Inc., Debtors, 224 F. Supp. 995 (S.D. Cal., 1964), is unrelated to that issue. There the court considered the validity of the collection rights given to the United States by the Renegotiation Act--to collect directly from a debtor of the delinquent taxpayer--when confronted with the reprimand of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended that all moneys owed the bankrupt be collected by the Trustee in Bankruptcy for the benefit of all the creditors. While placing the Bankruptcy Act and the Renegotiation Act constitutionally on the same footing, the court held that the necessity for uniformity and the generalized application of the Bankruptcy Act required placing its priority provisions ahead of specialized collection rights given by Congress under the Renegotiation Act.

Thus in the Pacific Products case the Government was attempting to circumvent the provisions of the Bankruptcy Act to obtain a priority as to the bankrupt's assets. Here in opposing a beneficiary of the bankrupt we are working within the provisions of the Bankruptcy Act to collect already finally adjudicated claims, claims which were established in the only tribunal having jurisdiction to consider their merits and which were properly presented for collection to the Trustee in Bankruptcy. Far from being interpreted, as appellant urges, to question the propriety of such a procedure, Pacific Products endorses it.

In short, we are doing precisely what Pacific Products tells us we must do and that is to collect our bills from the trustee and not to utilize the Renegotiation Act procedure for such collection after bankruptcy proceedings have been instituted.

- B. The doctrine of laches is here inapplicable because of appellant's failure to demonstrate that the United States caused the lengthy delay in the enforcement of its rights and because, in any event, laches is no defense against a sovereign

The defense of laches raised by the appellant requires a specific showing of a lack of diligence by the party against whom the defense is raised as well as some prejudice to the party asserting the defense. Costello v. United States, 365 U.S. 265, 281-283 (1961); Gardner v. Panama R. Co., 342 U.S. 29, 31 (1951); Southern Pacific Co. v. Bogert, 250 U.S. 483, 488-490 (1919); Gallihier v. Cadwell, 145 U.S. 368, 372 (1892). Neither has been

shown here. The appellant's sweeping and unsupported generalizations are an inadequate substitute for concrete proof of the Government's alleged misconduct.

The federal claims involved herein arose during the war years of 1944 and 1945. They were promptly and timely prosecuted. The tax claims against the bankrupt corporations were filed with the Trustee in Bankruptcy on December 18, 1946. (I-R. 87, 88.) The renegotiation claim against Communications Equipment was filed on January 29, 1947. (I-R. 89.) Since both of these dates are prior to the February 28, 1947 date of the corporations' adjudication of bankruptcy (I-R. 85), the filings were clearly timely. The renegotiation claim against Trans-Pacific was filed on July 3, 1947 (I-R. 90), well within the six-month limitation for the filing of such claims in bankruptcy.^{9/}

After the filing of the claims, the matter of their validity and enforcement came under the control of the Trustee and the Referee in Bankruptcy. Absent the showing of any specific instance of how the Government delayed the proceedings, there can be no

^{9/} From 10 to 30 days following the adjudication of bankruptcy, the creditors hold their first meeting. Bankruptcy Act, supra, Section 55 (11 U.S.C. 1964 ed., Sec. 91(a)). Creditors then have six months from the date of this meeting within which to file their claims with the Trustee in Bankruptcy. Bankruptcy Act, supra, Section 57 (11 U.S.C. 1964 ed., Sec. 93(n)). Although the record herein does not indicate when the first meeting was held, since the Government's claim was filed less than six months after the adjudication of bankruptcy, it must have been timely.

basis for branding its claims as "stale." Once timely made, they do not become untimely during the course of litigation. Assuredly, the Government does not have to defend the twenty-year "time in process" of the instant bankruptcy proceedings.

In any event, the appellant cannot use the doctrine of laches against a sovereign. A long and distinguished line of Supreme Court cases dating back to the early days of our judicial system have held that the laches cannot be a defense against the United States. United States v. Summerlin, 310 U.S. 414, 416 (1940); Board of Comm'rs v. United States, 308 U.S. 343, 351 (1939); United States v. Thompson, 98 U.S. 486, 489 (1878); United States v. Knight, 14 Pet. 301 (1840); United States v. Kirkpatrick, 9 Wheat. 720, 735-737 (1824).^{10/} The reasoning underlying this principle is, in the words of Justice Story, "to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officials." United States v. Hoar, 26 Fed. Cas. 329, 330 (1821).

^{10/} Appellant's sole precedent to support its application of the laches doctrine against the Government, City of Los Angeles v. County of Los Angeles, 9 Cal. 2d 624 (1937), holds only that laches can be made a defense against municipality. (Br. 9.) But one certainly would not classify a municipality as a sovereign.

Consequently, the appellant's argument for reversal on the basis of laches against the Government must be rejected. For, even if the appellant had satisfied his burden of demonstrating some inexcusable delay caused by the Government to his prejudice, such a delay would be remediless.

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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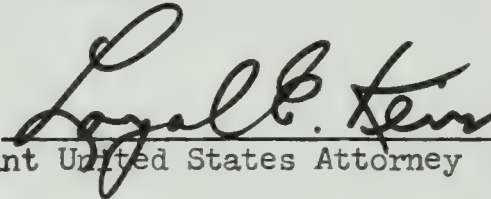
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 1st day of April, 1968.


Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

WILLIAM ROSENTHAL, individually and doing business as
CAL CLASSIC FURNITURE MANUFACTURING COMPANY, and
LYNARD OF CALIFORNIA, INC., a corporation, APPELLEES

Appeal from the United States District Court
For the Central District of California

PETITION FOR REHEARING

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IN 25 1968

FILED
2/26/68

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,625

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

WILLIAM ROSENTHAL, individually and doing business as
CAL CLASSIC FURNITURE MANUFACTURING COMPANY, and
LYNARD OF CALIFORNIA, INC., a corporation, APPELLEES

Appeal from the United States District Court
For the Central District of California

PETITION FOR REHEARING

Appellant respectfully petitions for rehearing of this Court's decision, dated December 8, 1967, and, because the issues seriously involve "the public interest in the administration of justice" (see Western Pac. R. Corp. v. Western Pac. R. Co., 206 F.2d 495, 496 (C.A. 9)), suggests that rehearing be en banc, on the following grounds.

1. The effect of the decision cannot be limited to "the particular circumstances of this case", for the issues here involved, and the circumstances in which they were raised, are typical of most enforcement actions under the Fair Labor Standards Act, as well as many other types of cases. Since the decision of this Court is fundamentally

at variance with relevant authorities in other circuits (see decisions discussed in Appellant's main brief, pp. 9-11, 15-17) it will unavoidably have a substantially damaging and unsettling impact upon future litigation in this circuit.

In denying the Secretary's claim that the informer's privilege protected the investigators' reports, as well as employee statements, from discovery, the district court in the instant case patently made no pretense of balancing the public interest in maintaining the privilege against appellees' need to obtain such documents, as required by Roviaro v. United States, 353 U. S. 53, 59, for it gave no consideration to appellees' ability to obtain any needed information by other means. On the contrary, it simply ruled that "the documents which defendants seek to discover are not privileged" (C. T. 91, 112). This ruling obviously is a complete departure from the decisions in other circuits (see our main brief, pp. 15-17), which have uniformly held that the privilege does apply to the names of informants and to investigative reports or statements which would reveal those names. The decisions of other courts of appeals have further held, under circumstances indistinguishable from the instant case, that a balancing of the public interest against the employer's need for such material weighed heavily in favor of non-disclosure.

In affirming the district court's ruling without explanation, it would appear that this Court has sanctioned the view that the informer's privilege is to have no efficacy whatever in this type of action. The absence of any reasoning in this Court's per curiam decision provides an open invitation to unrestrained demands by employer's for such privileged materials simply as a means of obstructing the Act's enforcement. Unless

corrected and clarified now, the decision will require further litigation, with the attendant risk that in the process of suffering dismissals in order to obtain appellate review there will be, as there was in the instant case, substantial loss to employees of back wages to which they are entitled.

Equally unsettling to future litigation is the approval given to the district court's conclusion that the "good cause" requirement of Rule 4 was met. Contrary to this Court's opinion, there were absolutely no findings below which would support this conclusion. On the contrary, in the absence of any showing by appellees of need for these documents, it is clear that the district court's order was based simply on the view that because the requested materials had some relevance to the case they must be produced (see R. T. 4-5, 9-10). In holding this sufficient to meet the "good cause" requirement, this Court's decision is plainly contrary to the Supreme Court's view of this test in Schlagenhauf v. Holder, 379 U.S. 104, and the view adopted by the other courts of appeals which have construed it. See Guilford National Bank of Greensboro v. Southern R. Co., 297 F.2d 921 (C.A.4); Alltmont v. United States, 177 F.2d 971 (C.A.3); Hauger v. Chicago, Rock Island & Pacific Railroad Co., 216 F.2d 501, 508 (C.A.7); and Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (C.A.D.C.) -- in each of which, even without the additional factor of a claim of privilege, orders for production were reversed because of the failure to show that special circumstances required such production.

2. This Court's affirmance of that portion of the district court's order requiring the production of the Wage-Hour investigators' reports

sanctions a wholly unprecedented ruling, ^{1/} which does not appear to have been fully or specifically considered by this Court.

Such investigative reports typically contain the names of all persons giving information (including those who may have first alerted the Department to an employer's possible violations), as well as summaries of such information and the investigator's comments on the degree of cooperation displayed by each employee and his potential value as a witness. Also included are such matters as the investigator's assessment of the likelihood of the employer's future compliance and his recommendations regarding disposition of the case. Thus, even if there were any justification in this case for ordering the production of statements limited to former employees who were to be called as witnesses -- presumably what this Court had in mind in referring to the "particular circumstances of this case" -- the limitations placed on that portion of the production order were completely vitiated by inclusion of the investigators' reports in the court's order for production. It is evident that those reports would reveal the identity and degree of cooperation of all informants, without distinction between present employees and former employees or those intended to be called as witnesses.

The basis for appellees' demand for inspection of the investigative reports was simply that they would apprise them of the factual basis of the Secretary's case -- a claim that can equally be made by any

^{1/} Prior to this case no court has ever ordered a Wage-Hour investigative report to be produced. The reported decisions refusing to order such production include Wirtz v. White, 40 F.R.D. 507 (N.D. Okla. 1965); Mitchell v. Savini, 25 F.R.D. 275 (D.MASS. 1960); Wirtz v. Wheelon Glass Co., 54 Lab. Cases 131,829 (D.N.J. 1966); and Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265, 268-269 (E.D.N.Y. 1943).

defendant who has similarly not bothered to utilize such other discovery procedures as interrogatories, depositions or interviews. This Court's decision affords no basis for distinguishing future cases when production of investigators' reports is sought. As a consequence, unless the decision is corrected, Wage-Hour investigators in this circuit will be unable to give any assurances of anonymity to potential informants, regardless of how removed from subsequent litigation such informants may otherwise be. As pointed out in the affidavit of the Administrator of the Wage and Hour Division (C.T. 58-59), it has been the Department's experience that employees either refuse or are reluctant to give information concerning violations unless assurances of confidentiality can be given. The result of this Court's decision, therefore, is to create a formidable obstruction to the enforcement of the Act within this circuit.

Accordingly, we submit, this petition for rehearing should be granted and the district court's order of dismissal reversed. At the very least, the order of dismissal should be reversed on the ground that it was error to order the production of investigators' reports, in which event a remand for reconsideration of the dismissal of the case would be appropriate.

Respectfully submitted.

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JANUARY 1968

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and that it is not filed for the purpose of delay.

**BESSIE MARGOLIN,
Associate Solicitor**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM JOSEPH COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

SEP 10 1967

WM B. LUCK, CLERK

SEP 10 1967

N O. 2 1 6 2 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM JOSEPH COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM JOSEPH COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On September 29, 1966 a one-count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-3]. ^{1/}

The indictment charged that on September 12, 1966 Robert James Coughlan by force, violence, and intimidation, with the use of a pistol, knowingly and willfully attempted to take money from a teller of a bank insured by the Federal Savings and Loan Corporation.

^{1/} C. T. refers to Clerk's Transcript of Record.

Further, that the appellant William Joseph Coughlan aided, abetted, counseled, induced and procured the commission of the above offense.

On October 10, 1966 the appellant and Robert Coughlan appeared with appointed counsels and entered pleas of not guilty [C. T. 5].

On November 1, 1966 Robert Coughlan pleaded guilty to the indictment [C. T. 7].

On November 1, 1966 appellant William Coughlan waived his rights to trial by jury and a court trial commenced. The appellant moved to suppress certain statements and a hearing was held. The court ruled the statements admissible. The appellee and appellant stipulated to the admission of certain testimony and facts. The court found the appellant guilty as charged [C. T. 6-7].

On November 28, 1966 the appellant was placed on three years probation pursuant to the terms of Title 18, United States Code, Section 5010(a) [C. T. 10].

On December 5, 1966 the appellants' Motions for New Trial and for Findings of Fact and Conclusion of Law were denied [C. T. 11].

Appellant filed a timely Notice of Appeal on December 5, 1966 [C. T. 12].

The offense occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a)(d) and Title 18, United States Code, Section 2. This Court has jurisdiction to

entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a)(d) provides in pertinent part:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of, any bank; or any savings and loan association"

"(d) Whoever, in committing or attempting to commit, any offense defined in subsections (a) . . . , assaults any person, or puts into jeopardy the life of any person by the use of a dangerous weapon or device,"

Title 18, United States Code, Section 2 provides in pertinent part:

"2(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

III

STATEMENT OF FACTS

On the morning of September 12, 1966, appellant William Coughlan borrowed an automobile from the Trosper family [R. T. 59]. ^{2/} Later that day Robert Coughlan while using a loaded pistol attempted to rob the Coast Federal Savings and Loan Association in Panorama City, California. The pistol and ammunition were taken from the home of Joseph Coughlan, father of Robert and William Coughlan [R. T. 59, lines 22-25].

Robert Coughlan was observed leaving the bank in the Trosper's automobile. The rear license plate was covered with mud [R. T. 59]. That afternoon appellant William Coughlan was arrested by F.B.I. agents and officers of the Los Angeles Police Department while driving the Trosper automobile [R. T. 16, 59]. After his arrest he was taken to the Los Angeles Police Department. He was interviewed by Agent Irvin Wells of the Federal Bureau of Investigation. Agent Wells advised appellant of his rights, and, when the appellant told the agent he desired to make no statement, the interview was terminated [R. T. 11, 17, 42].

On September 13, 1966, the appellant was taken before the Commissioner and Attorney Bernard Winsberg was appointed to represent him [R. T. 10-11; 23].

Subsequent to September 13, 1966, and prior to September

^{2/} R. T. refers to Reporter's Transcript.

15, 1966, pictures which had been taken at the bank were developed and it was discovered that Robert Coughlan was the individual who had attempted to rob the bank [R. T. 17, 49].

On September 15, 1966, Agent Wells along with another F. B. I. agent and Sergeant Seret of the Los Angeles Police Department went to 19708 Valley View Drive, Topanga, to locate and arrest Robert Coughlan [R. T. 18, 49]. The house at the above address is owned by Joseph F. Coughlan, the father of appellant and Robert Coughlan [R. T. 47]. The appellant lived with his parents at that address [R. T. 37]. Agent Wells had a conversation with Joseph Coughlan. He told Mr. Coughlan that certain negatives had been developed and they identified Robert Coughlan as the one who had attempted to rob the bank. Agent Wells then asked where he could find Robert Coughlan and Mr. Coughlan informed him that he did not know [R. T. 49]. Agent Wells then asked Joseph Coughlan "How is Bill" [R. T. 30, lines 8-9]. Mr. Coughlan replied that he had seen William Coughlan that morning and that he did not believe his son had received any visitors [R. T. 30]. He then recommended to Agent Wells that he go see William [R. T. 18, lines 20-21]. Agent Wells testified the father had said, "Why don't you go by and see Bill" [R. T. 30, lines 16-17], or "I recommend you see Bill", or "Might stop by" [R. T. 34, lines 8-10]. At that time Agent Wells decided to go back and see William Coughlan [R. T. 30].

Joseph Coughlan did not recall the above conversation [R. T. 49]. He was sure however that he did not tell the officers

they could represent to Bill that his father asked him to cooperate [R. T. 50].

On September 16, 1966, Agent Wells, F.B.I. Agent Jim Cagnassola and Detective Seret went to the County Jail to interview William Coughlan [R. T. 12, 19]. Appellant came into the interview room dressed in prisoner's blues and sat on the prisoner's side of the bench. The three officers sat across from the appellant facing him [R. T. 20]. Appellant did not appear to be nervous, agitated or upset. He was asked if he desired anything [R. T. 19].

At the outset of this interview appellant was advised of his rights. "He was advised that he did not have to make any statement, that any statement he did make could be used against him in a court of law. He was advised of his right to talk to an attorney or anybody else prior to the interview. He was told, if he so desired, his attorney could be present during the interview. He was further told that if he decided to make a statement at that time and any time during the interview he decided he did not want to answer any further questions, he could then stop." [R. T. 13, lines 5-15].

Appellant told the officers that he had an appointed attorney [R. T. 23, lines 12-14]. Appellant was then given his rights on a written form which was attached to a waiver of rights form. He read the rights and said he understood them. He said that he would be willing to talk but did not want to sign the paper [R. T. 21].

Agent Wells then advised the appellant that they had seen his father and that "Your father suggested" or "recommended"

that the agents come by to see him [R. T. 22, lines 7-9; 32, lines 7-8; 33, lines 4-10]. The appellant was not told that his father said he should make a statement [R. T. 22, 33].

Agent Wells advised appellant that he could make a statement, or not make a statement, whichever he desired. He told appellant to make a statement only if appellant thought making a statement would be beneficial to him. He told appellant that if he did not feel it would be beneficial to him, by all means he should not make a statement [R. T. 23, lines 3-7]. Appellant was not told it would help him if he made a statement [R. T. 24, lines 24-25, line 5]. The appellant did not immediately make any statement, he sat and thought [R. T. 24]. During the course of the interview he paused in a similar manner various times [R. T. 24].

Sergeant Seret told appellant "that inasmuch as he was charged with bank robbery that in all probability the state would not desire to prosecute him on a marihuana charge and that he would discuss this matter with the state authorities to determine if they would desire to prosecute him for possession of narcotics" [R. T. 25, lines 1-6]. Appellant was not told if he made a statement the charges would be dropped [R. T. 25, lines 14-23].

Sergeant Seret left the interview room and returned in approximately 20 minutes [R. T. 26]. During this time Agents Wells and Cagnasola talked to appellant in generalities. Appellant made no statement [R. T. 26]. When Sergeant Seret returned to the room he told appellant he had discussed the marihuana charge with state authorities and they decided not to prosecute [R. T. 27].

Approximately five to ten minutes later appellant made the following statement to the officers [R. T. 27, lines 14-15]:

"Thereafter Bill advised me that he and his brother Robert wanted to get away from their parents' home and get out on their own. He stated that they had no money.

"He noted that Robert had no automobile, that he had a motorcycle which was not in running condition.

"He stated that they decided to commit a robbery.

"Thereafter he noted that they decided to commit only one robbery.

"Q. Any particular kind of robbery, sir?

"A. He initially said they decided to commit a robbery. He thereafter stated that they decided to commit a bank robbery.

"He pointed out that they assumed that they could get approximately \$2,000 from one cash drawer in a bank. He said this is all they intended to get.

"He said that Robert decided that they should rob a bank which had a large parking lot to the rear and a fence over which the person who robbed the bank could make an escape and get to an automobile, thus preventing the license number to be copied.

"He then told me that on Sunday night,

September 11, 1966, he called Betty Trosper and asked her if he could borrow her mother's automobile. She told him he could have it and she would leave the car in the driveway with the keys in it.

"He said that he got this car for the express purpose of a bank robbery.

"He said on the following day, which would be Monday, September 12, 1966, he hitchhiked from his home in the Topanga area to the Trosper residence on Van Noord Avenue where he got the car and brought it to his house.

"He pointed out that when he got to his house he parked the car a little distance away from the residence to prevent neighbors from seeing it.

"He said that Robert then told him to put mud on the rear plate of the automobile to prevent the license from being copied, which he did.

"He stated that he then went into the house and got a gun from a gun cabinet. He said the gun was his father's. He got it to give to Robert. He said the gun was for the express purpose of a bank robbery.

"He said he then stayed at the house and Robert took the car and the gun and left. He said he did not know where Robert went. He only knew that Robert was supposed to be going to commit a

bank robbery, but he didn't know where the bank was.

"He said that Robert returned about, to the best of his knowledge, 2:00 o'clock that afternoon and related to him that he had attempted to rob a bank and gave him certain details about it. Thereafter they went to a friend's house for a while. He then returned the car to the Trosper residence that afternoon, at which time he was arrested by FBI agents and officers of the Los Angeles Police Department." [R. T. 13, lines 20 to 16, line 4].

The interview lasted approximately 20 - 25 minutes [R. T. 44].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal:^{3/}

- A. The Confession Admitted Was Not Free and Voluntary in That It Was Brought About by an Inducement, a Reward, and a Completed Promise of Immunity From State Prosecution.

^{3/} Appellant's Opening Brief, page 11.

ARGUMENT

- A. THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANT, HAVING BEEN REPEATEDLY WARNED OF HIS RIGHTS, KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.
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A failure to have counsel present at the time a confession is given cannot be said to ipso facto render the confession involuntary and inadmissible. United States v. Plata, 361 F.2d 958 (7th Cir. 1966); United States v. Thomas Patrick Smith, No. 15878, 7th Cir. June 22, 1967: corrected to No. 15878, April Session 1967. This is so even where the declarant is of young age and alleged veiled threats are present. Butterwood v. United States, 365 F.2d 380 (10th Cir. 1966). Rather, where it is clear that proper warnings concerning the right to counsel and right to remain silent were given, the case should be scrutinized on its facts to determine the question of knowing and intelligent waiver. Narro v. United States, 370 F.2d 329 (5th Cir. 1966).

In examining the context of an accused's confession in the absence of counsel, an "awareness" of one's right to advice of counsel has been said to be the threshold requirement for an intelligent decision as to its exercise. Miranda v. Arizona, 384 U.S. 436 (1966). In our case, before the statement made on September 16, 1966, appellant had been repeatedly informed in clear and unequivocal terms of his rights. Immediately following

his arrest on September 12, 1966, appellant was advised of his constitutional rights [R. T. 11, 17, 42]. Appellant must have understood his constitutional safeguards for he told Agent Wells he refused to make a statement. The interview was immediately terminated [R. T. 11]. Thus, at that time appellant was made to realize that the F. B. I. agents were prepared to respect his rights if he desired to exercise them. The following day appellant was taken before the United States Commissioner. The Commissioner advised the appellant of his rights and appointed an attorney to represent him [R. T. 10-11, 23]. Finally, at the outset of the interview on September 16, 1966, appellant was both orally and in writing given another complete and explicit reminder of his constitutional rights to remain silent and to have an attorney present at an interview should he choose to make a statement [R. T. 23]. Appellant told the officers that counsel had been appointed to represent him. Further, he stated that he read the written statement of his rights and understood them. He said that he would be willing to talk but did not wish to sign the paper [R. T. 21].

The Constitution cannot force an unwanted attorney upon a defendant. Minor v. United States, 375 F.2d 170 (8th Cir. 1967). After an adequate warning of rights has been given "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement". Miranda v. Arizona, supra, at 479. There is no evidence that the defendant ever asked for or was denied the assistance or access of counsel at the time

of his conversations with Agent Wells and Sergeant Seret. Rather, the record indicates that appellant made a rational decision to make a statement without the presence of his attorney, being fully aware that his attorney could be present if he so desired [R. T. 21, 23].

And appellant's reason for not signing the printed waiver of his rights form, which he had read, was not related to any reluctance to speak. Rather, it was a reluctance to furnish his signature. "He said he would be willing to talk to us, but he did not want to put his signature to the paper." [R. T. 21].

The "affirmative waiver" required by Miranda need not be a written waiver. The written waiver forms are no more than an aid to the prosecution in establishing that an accused understood and waived his rights. For in some cases it is difficult for the prosecution to sustain its heavy burden without this physical evidence. An accused may testify that the law enforcement officers never advised him of his rights. It is in this circumstance that a written waiver is most helpful. However, that is not the situation in our case. Appellant is not asserting any failure of Agent Wells to comply with the specific warning requirements of Miranda and Escobedo.

As the record reflects at pages 56 and 57, the trial judge clearly understood "the serious and weighty responsibility he had of determining whether there was an intelligent waiver by defendant". Johnson v. Zerbst, 304 U.S. 458 at 465 (1938). He had the opportunity to observe the demeanor and intelligence of the

appellant while he testified. He concluded that the appellant orally waived his rights and made a statement [R. T. 57]. On the basis of the record his conclusion was correct.

B. APPELLANT'S VOLUNTARY STATEMENT WAS NOT THE PRODUCT OF AN IMPLIED PROMISE OR IMPROPER INFLUENCE.

Appellant contends the trial court erred in its determination that his statements were freely and voluntarily given to Agent Wells. He contends that he was psychologically coerced into making the statements. His attack is twofold. First, he alleges that statements made by Agent Wells concerning conversations with his father, Joseph Coughlan, amounted to improper influence. Second, he alleges that his statement was prompted by a promise of immunity from state prosecution coupled with the likelihood of federal probation.

On both of the above points there is a conflict in the testimony. As to the first point Agent Wells testified he told appellant that Joseph Coughlan had "suggested" or "recommended" that he come by to see appellant [R. T. 22, lines 7-9; 32, lines 7-8; 33, lines 4-10]. The appellant was not told that his father said he should make a statement [R. T. 22, 33]. On the other hand, appellant testified that Agent Wells told him his father said "that it would be better if I made a statement, that I would co-operate all the way with the FBI" [R. T. 39, lines 12-14]. As to the second

point Agent Wells testified the appellant was not told that if he made a statement certain state marihuana charges against him would be dropped [R. T. 25]. Rather appellant was informed that the state did not desire to prosecute on the marihuana charge in that he was being held and charged with bank robbery [R. T. 37]. Appellant testified he was told that it would be possible to get probation on the federal charge, but that if he had another state charge for marihuana he would not get probation [R. T. 40, 45]. Further, appellant testified that Detective Seret implied that the marihuana charges would be dropped if appellant made a statement about the bank robbery [R. T. 45].

The trial judge heard the testimony of the witness and recognized these discrepancies. He resolved these factual questions in favor of the appellee by finding the statement free and voluntary [R. T. 56-57]. Viewing this evidence in the light most favorable to the government was the judge correct in ruling?

"Confessions remain a proper element in law enforcement and when given freely and without any compelling influences are admissible in evidence." Cox v. United States, 373 F.2d 500 (8th Cir. 1967). The standards employed by the courts to assess the voluntariness of an accused's statements have emphasized a variety of factual criteria. Appellee contends that appellant is not able to bring his situation within the facts of the "coercion" cases that he claims are controlling. No threats of retribution against his family are asserted here as in Spano v. New York, 360 U. S. 315 (1959). In fact none of the usual indicia of duress

were present in this case. The appellant was 20 years of age [R. T. 41]. The interview lasted approximately 20-25 minutes [R. T. 44]. It was not excessively lengthy as in Haley v. Ohio, 332 U.S. 596 (1948), nor was defendant kept incommunicado for a lengthy period of time as in Haynes v. Washington, 373 U.S. 503 (1963).

The Second Circuit recently pointed out that the language "implied promises, however slight", has never been applied with wooden literalness. The Supreme Court has consistently made clear that the test of voluntariness is ultimately whether an examination of all the circumstances discloses the conduct of law officers was such as to overbear the defendant's will to resist and bring about a confession. United States v. Ferrara, 377 F.2d 16 at 17 (2nd Cir. 1967). In the Ferrara case a statement by a federal agent to defendant that if the accused cooperated he would see what could be done about reducing bail was not considered the type of inducement contemplated by the phrase coercion. In the case before this Court no offer or promises were made to appellant concerning the state charges pending against him. The fact that Detective Seret reappeared during the interview and announced the state charges were to be dropped cannot be said to have been a type of coercion directed towards eliciting a confession from defendant. Even if this Court should find that statement coercive, it is important when examining coercion that there be a nexus between any overreaching by interrogating agents and defendant's confession to render a confession involuntary. United States v.

Morariety, 375 F.2d 901 (7th Cir. 1967); Fernandez-Delgado v. United States, 368 F.2d 34, 36 (9th Cir. 1966). Here appellant was informed the charges were to be dropped prior to making a statement.

The fact that Agent Wells told appellant his father had "recommended" they see him cannot be said to have created the kind of atmosphere of inducement, nor was it the kind of illegal technique, contemplated by the courts in finding involuntariness. Davis v. North Carolina, 384 U.S. 737 (1966).

VI

CONCLUSION

For the reasons set forth herein, the Government respectfully requests that the judgment and conviction of appellant be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger Browning
ROGER BROWNING





